

Curriculum Unit

Author: Elliot Rotvold

Publius vs. Brutus and the Debate over the “Least Dangerous” Branch (*4 Lessons*)

Overview

The Supreme Court is the leader of the “least dangerous” branch of the United States government. Alexander Hamilton made this assertion as Publius in [Federalist 78](#) when he observed that the judicial branch of government “from the nature of its functions” will be “the weakest of the three departments of power and will therefore be the “least dangerous” under the proposed Constitution. Does the argument made by Publius still appear to be true today in the wake of such controversial decisions as the Court’s decision on abortion rights in [Roe v. Wade](#) or its handling of the case [Bush v. Gore](#) which effectually elevated George W. Bush to the presidency in 2000?

Despite its weaknesses and vulnerability in relation to the other branches, the Supreme Court’s power and influence in the national government has dramatically increased over the last half century. With its statement in the 1958 case of [Cooper v. Aaron](#), where the Court declared that its opinions constitute “the supreme Law of the Land,” the Supreme Court has invoked a claim that some would call “judicial supremacy.” In this respect, the Court’s assertion of authority essentially amounts to the very arguments made by the Antifederalist Brutus when he warned that the new Constitution’s judicial branch would eventually wield a power “independent in the fullest sense of the word” as there is “no power above them to control their decisions.” The assertion of judicial supremacy has been reiterated by subsequent Supreme Court decisions such as [Baker v. Carr](#) (1962), [Powell v. McCormack](#) (1969), [United States v. Nixon](#) (1974), [Planned Parenthood v. Casey](#) (1992), and [Boerne v. Flores](#) (1997). In all these cases and others, the court has continued to assert its “ultimate interpreter” status. The willingness of the other two branches and even the people to allow the Court’s role and authority to claim such a lofty status has led to questions about whether the judicial branch is still the “least dangerous.”

In this unit, students will examine the shifting tide of judicial authority by first looking back at the Founding period and the debates on the role and function of the judicial branch that took place between Federalist, Publius, and Antifederalist, Brutus. They will learn from a review of their contending arguments that the [Cooper](#) dictum of “judicial supremacy” goes far beyond the original Constitutional design of the judicial branch. They will become familiar with Chief Justice John Marshall’s decision in [Marbury v. Madison](#) (1803) and how, faced with threats to its power, this judgment brought legitimacy to the Supreme Court as a co-equal branch of the United States government through a narrow interpretation of the authority of judicial review. They will also explore the controversial claim of “judicial supremacy” in the case [Cooper v. Aaron](#) and how the Supreme Court dramatically changed its own authority and the scope of judicial review. Finally, students will consider the Supreme Court’s continued assertion as the final authority on the Constitution by examining the case [Planned Parenthood v. Casey](#) and the

Court's view of the importance of precedent to its position as the protector of individual liberty in American democracy.

Reconciling democracy and its majoritarian tendencies with a stable form of government that protects the rights of individuals was a challenge that the Founding generation tried to solve through the creation of an independent judicial branch. The evolution of American democracy and politics over the last two centuries, especially the last fifty years, has certainly proven that the Supreme Court can be a powerful force in the national government without the purse or the sword.

Guided Questions

- What are Brutus's fears about the power of the judiciary in relation to Congress and the States?
- What are the merits to Brutus's view that the judicial branch under the Constitution will be "independent of heaven itself?"
- Why does Publius believe that the judiciary is the "least dangerous branch?"
- What are the merits to Publius's argument that the judiciary will exercise only "judgment?"
- Why was the power of judicial review, explained in John Marshall's decision in *Marbury v. Madison*, important to the future of the Supreme Court as a co-equal branch of government?
- What was the prevalent history of judicial review as it pertained to the Founding period?
- What does the political context of this case illustrate about the nature of the Judiciary?
- What significant changes were made to the power and function of the Supreme Court with the critical decision in [*Cooper v. Aaron*](#)?
- What historical arguments regarding judicial supremacy were made during the Ratification debates between Publius and Brutus concerning the proposed Constitution and judicial power?
- Since the decision in [*Cooper v. Aaron*](#), have the other two branches simply allowed the Supreme Court to be the sole interpreter of the Constitution?
- What significant explanations of the legitimacy and power of the Court were justified in [*Planned Parenthood v. Casey*](#) in regard to the principles of [*stare decisis*](#) and standards of precedent and did they demonstrate judicial supremacy?
- What historical arguments regarding the significance of precedent to judicial function and power were made during the [Ratification debates between Publius and Brutus](#)?
- What was the importance of the decision in [*Planned Parenthood v. Casey*](#) to the concept of personal liberty under the Due Process Clause of the Fourteenth Amendment and did it express the "spirit" of law which Brutus claimed would expand judicial power?

Learning Objectives

After completing the lessons in the unit students will be able to:

- Explain how British and colonial history helped to define the role and function of the judiciary under the proposed Constitution.

- Explain the differences in the arguments between Publius and Brutus on the advantages and dangers of judicial independence under the proposed Constitution.
- Explain the opportunities and limitations of the judiciary as a political branch of government.
- Explain the role of the Supreme Court in interpreting the Constitution of the United States.
- Explain the importance of judicial review and the significance of [*Marbury v. Madison*](#) and the roles each has played in the future history of the Supreme Court.
- Understand the history of the concept of judicial review and its origins in the Founding era.
- Compare the arguments on the power of judicial review, which both Publius and Brutus believe is given to the courts by the Constitution.
- Analyze the debates between Publius and Brutus and illustrate the differences in the arguments pertaining to so-called judicial supremacy within the Constitution.
- Explain the key components of the majority decision in the Supreme Court case [*Cooper v. Aaron*](#).
- Examine other Supreme Court decisions and assess whether the other two government branches have been compliant to judicial supremacy.
- Support an argument for or against judicial supremacy through an examination of primary source documents.
- Analyze the debates between Publius and Brutus and compare and contrast their differing view of the significance of precedent to the power of the judiciary.
- Explain the importance of [*stare decisis*](#) to constitutionalism as defined by the Supreme Court in [*Planned Parenthood v. Casey*](#).
- Examine the Supreme Court decision in [*Planned Parenthood v. Casey*](#) and assess whether the Court used the standards of precedent to claim judicial supremacy.
- Support an argument for or against the Supreme Court's use of the principles of [*stare decisis*](#) and the standards of precedent to claim legitimacy in regard to its power of interpreting the Constitution.

Preparation Instructions

Review each lesson plan. Locate and bookmark suggested materials and links from the websites. Download and print out selected documents and duplicate copies as necessary for student viewing. Alternatively, excerpted versions of these documents are available as part of these lessons.

Teachers will need to read the background and all documents to fully understand the concepts involved in this unit. Students will be asked to read the documents as part of the activities and assessments involved in the unit and this will lead to a better understanding of the debates between Publius and Brutus on the power and function of the “least dangerous” branch of the proposed government under the Constitution.

Working with Primary Sources

If your students lack experience in dealing with primary sources, you might use one or more preliminary exercises to help them develop these skills. [The Learning Page](#) at the [American Memory Project of the Library of Congress](#) includes a set of such activities. Another useful resource is the [Digital Classroom of the National Archives](#), which features a set of [Document Analysis Worksheets](#). Finally, [History Matters](#) offers pages on ["Making Sense of Maps"](#) and ["Making Sense of Oral History"](#) which give helpful advice to teachers in getting their students to use such sources effectively.

The Lessons

- **Lesson 1** – Publius vs. Brutus: Arguments over the Role and Function of the Judicial Branch in the American Political System
- **Lesson 2** – [Marbury v. Madison](#): Establishing the Legitimacy of the Judicial Branch of Government
- **Lesson 3** – [Cooper v. Aaron](#): The Controversial Claim of Judicial Supremacy
- **Lesson 4** – [Planned Parenthood v. Casey](#): The Importance of Precedent to Judicial Legitimacy and Power

Selected Websites and Documents for the Unit

Teaching American History

- [The Federalist Papers](#)
- [Federalist 48](#)
- [Federalist 78](#)
- [Federalist 79-83](#)
- [Brutus XV](#)
- [Brutus XI-XIV and XVI](#)
- [Federalist 81](#)
- [Brutus XII](#)
- [Declaration of Independence](#)
- [Constitutional Convention of 1787](#)
- [Marbury v. Madison](#)
- [Debates on the Constitutional Convention](#)
- [Brown v. Board of Education](#)
- [Brown v. Board of Education II](#)
- [Supremacy Clause of the Constitution](#)
- [The Constitutional Convention](#)
- [Abraham Lincoln on Dred Scott](#)
- [Plessy v. Ferguson](#)

The Avalon Project

- [Article III of the U.S. Constitution](#)

The Founders Constitution

- [Thomas Jefferson – Notes on the State of Virginia](#)
- [Thomas Jefferson to Spencer Roane, 1819](#)

[The Jacobite Heritage](#)

- [The Act of Settlement of 1701](#)

[Federal Judicial Center](#)

- [Judiciary Act of 1789](#)
- [Judiciary Act of 1801](#)
- [Judiciary Act of 1802](#)

[Library of Congress](#)

- [Election of 1800](#)

[Justicia.com US Supreme Court](#)

- [Cooper v. Aaron](#)
- [Brown v. Allen](#)
- [Baker v. Carr](#)
- [Powell v. McCormack](#)
- [United States v. Nixon](#)
- [Planned Parenthood v. Casey](#)
- [Boerne v. Flores](#)
- [Roe v. Wade](#)
- [Lochner v. New York](#)
- [Adkins v. Children's Hospital of District of Columbia](#)
- [West Coast Hotel Co. v. Parrish](#)

[Cornell University Law School – Legal Information Institute](#)

- [14th Amendment of the Constitution](#)
- [Due Process Clause of the 14th Amendment](#)
- [Bush v. Gore](#)

[The Lost Year 1958-1959](#)

- [Little Rock Central High School](#)
- [Governor Faubus](#)

[Government Documents Round Table](#)

[American Library Association](#)

- [Arkansas Assembly Legislation](#)

[History Matters](#)

- [Eisenhower Speech on Little Rock Crisis](#)

[The American Presidency Project](#)

- [George W. Bush signs McCain-Feingold](#)

[“Timeline of Supreme Court School-Desegregation Cases from Brown to Fisher,”](#)

[The Free Dictionary – Legal Dictionary](#)

- [Definition of *stare decisis*](#)

[Street Law](#)

- [Supreme Court Lessons](#)

[The Supreme Court, PBS](#)

- [Lesson Plans](#)

[Cornell University Law School Legal Information Institute](#)

- [Dissent in Planned Parenthood v. Casey, Justice Scalia](#)

Dissent in Planned Parenthood v. Casey, Chief Justice Renquist

The Basics for the Unit

Grade Level

- 9-12

Time Required

- 3 to 5 class periods for each lesson

Subject Areas

- History, Social Studies
 - U.S. Constitution
 - U.S. History
 - Government
 - Political Science
 - AP U.S. History, Government

Skills

- Critical analysis
- Critical thinking
- Discussion
- Evaluating arguments
- Gathering, classifying and interpreting written, oral and visual information
- Historical analysis
- Interpretation
- Making inferences and drawing conclusions
- Using primary sources

Unit Resources

- All text documents for activities and assessments are attached following each lesson.
- Student activities and directions for each are included with each lesson.
- Assessments are included with each lesson including some for differentiated learning.
- Information on extending the lessons are given with each lesson.
- All websites and links to documents are included with each lesson.

Author of Unit: Elliot Rotvold

Publius vs. Brutus and the Debate over the “Least Dangerous” Branch

The Supreme Court is the leader of the “least dangerous” branch of the United States government. Alexander Hamilton made this assertion as Publius in *Federalist* 78 when he observed that the judicial branch of government “from the nature of its functions”¹ will be “the weakest of the three departments of power”² and will therefore be the “least dangerous”³ under the proposed Constitution. Does the argument made by Publius still appear to be true today in the wake of such controversial decisions as the Court’s decision on abortion rights in *Roe v. Wade* or its handling of the case *Bush v. Gore* which effectually elevated George W. Bush to the presidency in 2000? Despite its weaknesses and vulnerability in relation to the other branches, the Supreme Court’s power and influence in the national government has dramatically increased over the last half century. With its statement in the 1958 case of *Cooper v. Aaron*, where the Court declared that its opinions constitute “the supreme Law of the Land,”⁴ the Supreme Court has invoked a claim that some would call “judicial supremacy.” In this respect, the Court’s assertion of authority essentially amounts to the very arguments made by the Antifederalist Brutus when he warned that the new Constitution’s judicial branch would eventually wield a power “independent in the fullest sense of the word” as there is “no power above them to control their decisions.”⁵ The assertion of judicial supremacy has been reiterated by subsequent Supreme Court decisions such as *Baker v. Carr* (1962), *Powell v. McCormack* (1969), *United States v. Nixon* (1974), *Planned Parenthood v. Casey* (1992), and *Boerne v. Flores* (1997). In all

¹ Alexander Hamilton, “Federalist 78,” *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 522.

² *Ibid.*, 523.

³ *Ibid.*, 522.

⁴ *Cooper v. Aaron*, 358 U.S. 1 (1958).

⁵ Brutus, “Brutus XV,” *The Anti-Federalist: An Abridgment, by Murray Dry, of the Complete Anti-Federalist*, ed. Herbert J. Storing (Chicago and London: The University of Chicago Press, 1985), 183.

these cases and others, the court has continued to assert its “ultimate interpreter”⁶ status. The willingness of the other two branches and even the people to allow the Court’s role and authority to claim such a lofty status has led to questions about whether the judicial branch is still the “least dangerous.”⁷

In order to more closely examine the shifting tide of judicial authority it is important to go back in history and look at the debates on the role and function of the judicial branch that took place between the Federalists and Antifederalists during the Founding period. Both sides had differing views of the power and function of the judicial branch, but neither would go as far as the court did in *Cooper v. Aaron*. The most prominent concern of the Antifederalist and Federalist debate was the power of judges to declare statutory laws unconstitutional. Given that judges were appointed for life and their decisions could not be reviewed by another democratically elected branch, Brutus indeed feared that their decisions would be “independent of heaven itself.”⁸ Publius, by contrast, argued in *The Federalist Papers* that the court’s role would be benign because the court, having neither “force nor will but merely judgment,” will always be “the least dangerous.”⁹ A review of their contending arguments reveals that the *Cooper* dictum of “judicial supremacy” goes far beyond the original design of judicial authority and power. It could certainly be conceded that the Supreme Court today, as Brutus predicted, has the ability to “mould the government into almost any shape they please”¹⁰ and its power “transcends any power before given to a judicial by any free government under heaven.”¹¹

⁶ Pollock, Earl E, “Who has the Last Word? Three Theories of Judicial Review” (April 28, 2013). Available at SSRN: <http://ssrn.com/abstract=2257509> or <http://dx.doi.org/10.2139/ssrn.2257509>, 33.

⁷ Hamilton, “Federalist 78,” *The Federalist*, 523.

⁸ Brutus, “Brutus XV,” *The Anti-Federalist*, 183.

⁹ Hamilton, “Federalist 78,” *The Federalist*, 523.

¹⁰ Brutus, “Brutus XI,” *The Anti-Federalist*, 167.

¹¹ Brutus, “Brutus XV,” *The Anti-Federalist*, 183.

According to Publius, the judicial branch would never rise to such a position that it would ever pose much of a threat to the executive or legislative branches. Rather, the courts perform the task of merely acting as an “intermediate body between the people and the legislature”¹² applying the black letter of the law to particular cases. The judiciary’s independence from the other branches posed no threat because the task of the judge was merely mechanical; a technical legal service rather than a political exercise of power. “Permanency in office” was necessary to protect these judges from encroachment by the other political branches as it was the judiciary that was in “continual jeopardy of being overpowered, awed or influenced” by the other two branches.¹³

Even their most controversial authority, the right to declare laws unconstitutional and thus unenforceable, was for Publius simply an acknowledgement of the fact that the Constitution is superior to any act of the legislature. According to Publius, this assertion is true because, “There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the Constitution, can be valid.”¹⁴ Publius added that this idea of judicial review is nothing more than normal judicial activity under many state constitutions that have “committed the judicial power in the last resort, not to a part of the legislature, but to distinct and independent bodies of men.”¹⁵ This norm is also prevalent in the judicial structure of “all nations” as they have found “it necessary to establish one court

¹² Hamilton, “Federalist 78,” *The Federalist*, 524.

¹³ *Ibid.*, 523.

¹⁴ *Ibid.*, 524.

¹⁵ Hamilton, “Federalist 81,” *The Federalist*, 544.

paramount to the rest – possessing a general superintendence, and authorized to settle and declare in the last resort, a uniform rule of civil justice.”¹⁶

Publius believed that an independent judiciary with lifetime tenure was needed to ensure that the judiciary would not be swallowed up by the other two branches. The only way the courts could be the “bulwarks of a limited constitution” was to have “permanent tenure of judicial offices, because nothing will contribute so much as this to that independent spirit in the judges.”¹⁷ As far as judicial review is concerned, Publius believed that “no act contrary to the constitution can be valid”, because if this type of act was permitted “the representatives of the people” would be “superior to the people themselves.”¹⁸ He did not see this as “judicial supremacy”, but rather as a case of the “people being superior to both” the legislative and judicial branches because judges ought to be governed by the constitution of the people and not by legislative statutes that are found to be in opposition of the constitution.¹⁹

Rather than a threat to democracy, the judicial branch is the primary safeguard of the Constitution – the “fundamental law instituted by the people.”²⁰ As Publius states, “Laws are a dead letter without courts to expound and define their true meaning and operation.”²¹ Along with this, there needs to be one “supreme tribunal”²² that is above all the rest that will make decisions in the last resort. If each of the states had a court of final jurisdiction it would lead to countless differences in the interpretation of the same law and there would be confusion on the

¹⁶ Hamilton, “Federalist 22,” *The Federalist*, 143-144.

¹⁷ Hamilton, “Federalist 78,” *The Federalist*, 526-527.

¹⁸ *Ibid.*, 524.

¹⁹ *Ibid.*, 525.

²⁰ *Ibid.*

²¹ Hamilton, “Federalist 22,” *The Federalist*, 143.

²² *Ibid.*

meaning of the Constitution.²³ If the legislative branch was allowed to be “the constitutional judges of their own power”, it would “enable the representatives of the people to substitute their will to that of their constituents.”²⁴ Decisions in the last resort and the interpretation of the Constitution, therefore, need to be “the peculiar province of the courts”, because if there is conflict between the Constitution and acts of Congress “the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.”²⁵ For Publius, judges occupy a necessary position of being the bulwark against efforts by the other two branches to transgress the fundamental will of the people embodied in the Constitution.

Others, however, were not convinced that the court would be so benign when its exercise of power confronted the other branches of government. Brutus argued that the Judiciary, with its provision for lifetime tenure, “would be exalted above all other power in the government”²⁶ being unchecked by the more popular branches of government. Brutus felt that the Supreme Court could do much harm even without the power of the “purse or sword.”²⁷ With “no power above them to set aside their judgment”²⁸, judges would be emboldened under this system to interpret the Constitution in a way that advanced their own power at the expense of both the other branches and the states. In fact, under this Constitution, they will be totally independent of the people as they will not have to confine their decisions “to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution.”²⁹

²³ Ibid.

²⁴ Hamilton, “Federalist 78,” *The Federalist*, 525.

²⁵ Ibid.

²⁶ Brutus, “Brutus XV,” *The Anti-Federalist*, 182.

²⁷ Hamilton, “Federalist 78,” *The Federalist*, 522-523.

²⁸ Brutus, “Brutus XV,” *The Anti-Federalist*, 183.

²⁹ Brutus, “Brutus XI,” *The Anti-Federalist*, 165.

Brutus believed the judicial power given under this Constitution will be “altogether unprecedented in a free country.”³⁰ Their independence and power will be beyond anything “the world ever saw”³¹ as their decisions cannot be corrected by any power above them and they cannot be removed from office for errors in judgment. Their power will also in many cases be superior to the legislature, because they will be authorized to decide upon the meaning and give construction to the Constitution. Therefore, “if the legislature passes any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void.”³² The nature and extent of their judicial powers will “extend the powers to the general government, to the diminution, and finally to the destruction of the respective states.”³³ The Antifederalists not only believed that the Judiciary would undermine the more democratic legislative branch, but it would more insidiously swallow up the most republican source of power in the country – the state governments. The court, according to Brutus, would be the vehicle for effecting a national consolidation of power in the long term: “perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial.”³⁴

Through an examination of the competing views of Publius and Brutus in regard to the power and function of the judicial branch under the proposed Constitution, it is clear that Brutus was concerned about what today would be called “judicial supremacy”. For Brutus and the Antifederalists, the idea of an independent judiciary with lifetime tenure and with the power of judicial review was an alarming scheme of government in respect to federalism and separation of powers. They believed that “the proper province of the judicial power, in any government”, is and should be “to declare what is the law of the land..., but not to declare what the powers of the

³⁰ Ibid., 163.

³¹ Brutus, “Brutus XV,” *The Anti-Federalist*, 183.

³² Ibid., 185.

³³ Brutus, “Brutus XII,” *The Anti-Federalist*, 167.

³⁴ Brutus, “Brutus XV,” *The Anti-Federalist*, 186.

legislature are.”³⁵ This would make the judicial branch “exalted above all other power in the government, and subject to no control.”³⁶ Brutus believed that the legislature or “some body of men, who depend upon the people for their places”³⁷ should have been given the power in the last resort to determine the construction of the constitution. If some institution must have the final say on the meaning of the Constitution, it ought to be the legislature since the “constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice.”³⁸ Only through the legislative branch can popular will be truly felt. The proposed constitution, on the other hand bemoans Brutus, has foolishly put this power “in the hands of men independent of the people, and of their representative, and who are not, constitutionally, accountable for their opinions.”³⁹

The challenges the founders faced in creating a judicial branch under the proposed Constitution turned on the question of whether an independent judiciary with the power of judicial review “would yield desirable consequences for the American people.”⁴⁰ Publius and Brutus agreed that an independent judiciary was needed and that, under the constitution, the Supreme Court had “the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution.”⁴¹ What they disagreed on was the scope of the independence and “what judicial review meant for the states and the relative power of courts and legislatures.”⁴² Brutus saw the power and function of the

³⁵ Brutus, “Brutus XIII,” *The Anti-Federalist*, 175.

³⁶ Brutus, “Brutus XV,” *The Anti-Federalist*, 182.

³⁷ Brutus, “Brutus XVI,” *The Anti-Federalist*, 188.

³⁸ Brutus, “Brutus XV,” *The Anti-Federalist*, 187.

³⁹ Ibid.

⁴⁰ Shawn Gunnarson, “Using History to Reshape the Discussion of Judicial Review,” *Brigham Young University Law Review*, no. 1, Article 3 (1994): 180.

⁴¹ Brutus, “Brutus XII,” *The Anti-Federalist*, 168.

⁴² Gunnarson, “Using History,” 180.

courts subverting or even destroying the states. Publius saw the courts as the protectors of the people from the encroaching power of the legislature.

Looking back at the debates between the Federalists and Antifederalists on the power and function of the judicial branch offers us a chance to answer the question of whether the authority of the courts today has gone beyond the scope of what either Publius or Brutus would see as the proper role of the courts. An argument can be made that the Supreme Court of the past half century has indeed asserted itself as the “ultimate interpreter”⁴³ of the Constitution, thus creating in practice what the Antifederalists feared in theory: “judicial supremacy.” Yet, the court is also regarded by the public today as the primary defender of the rights of the people. Hence, it appears that the court has gained this authority with the acquiescence of the people of the United States. I believe it is imperative that scholars today turn back to the original design of the judicial branch and understand how the Framers designed an institution that could both protect the will of the people embodied in fundamental law and at the same time function in a manner that would continue to complement democracy after the Founding. Understanding our contemporary dilemma over the authority of the court requires placing this debate within its proper constitutional context.

Judicial Independence

“The judiciary in the United States has become an institution of paramount importance, enjoying a security of tenure and a scope of influence elsewhere unknown among modern governments.”⁴⁴ The emergence of an independent judiciary within American constitutionalism had “multiple and sometimes inconsistent origins” and it did not become a “core element” of

⁴³ Pollack, “Who Has the Last Word?”, 33.

⁴⁴ William S. Carpenter, *Judicial Tenure in the United States*, (New Haven, CT: Yale University Press, 1918), Google Books edition, 1.

constitutional thinking until the late eighteenth century,⁴⁵ or even the early nineteenth century. The historical foundations for this evolving concept of judicial independence included the legacy of English Parliament's Act of Settlement of 1701, the reaction against the misuse of power by legislative branches created by state constitutions during the Revolutionary-era, and the need to establish an impartial institution that could have jurisdiction over national and state conflicts.⁴⁶

The road to an independent judiciary was complicated and challenging and was not even guaranteed by the formal stipulations of the constitution, which included lifetime tenure, salary protections and a high standard for removal by impeachment. Instead, this "crown jewel of our constitutional design"⁴⁷ had to be secured over time as federal judges tried to remain "independent of popular passions and certain kinds of pressures from the political branches of government"⁴⁸ while still trying to remain accountable to the people and to the fundamental law of the Constitution.

The history of judicial independence, in terms of lifetime tenure, can be traced back to "the legacy of the English Parliament's Act of Settlement of 1701, which established that royal judges should serve during good behavior, and not at the King's pleasure."⁴⁹ Before the passage of the Act of Settlement, royal judges were considered the pawns of the King as they "held their places at the pleasure of the crown."⁵⁰ The courts were also seen differently prior to the 1701

⁴⁵ Jack N. Rakove, "The Original Justifications for Judicial Independence," *The Georgetown Law Journal*, 95 (2007): 1062.

⁴⁶ Ibid.

⁴⁷ Rosen, Honorable Gerald E., and Kyle W. Harding. "Reflections Upon Judicial Independence As We Approach the Bicentennial of Marbury v. Madison: Safeguarding the Constitution's "Crown Jewel"." *Fordham Urban Law Journal*. No. 3 (2001): 791.

⁴⁸ Vicki C. Jackson, "Packages of Judicial Independence: The Selection and Tenure of Article III Judges," *The Georgetown Law Journal*, 95 (2007): 969.

⁴⁹ Rakove, "The Original Justifications," 1062.

⁵⁰ Ibid., 1063.

Act being passed. They were perceived as “active agents of royal power”⁵¹ and not as independent entities of mediation. The Act of Settlement gave some individual independence to the judges of England by granting them what would be considered lifetime tenure. They were free to make judicial decisions based on the law and not on the premise that the King held their political life in his hands.

Securing the independence of individual judges, however, did not mean that the judiciary had become a separate, independent department of government. They were still viewed as part of the executive branch, and the legislative branch could supersede their decisions. Common law jurisprudence, which was the British doctrine of this period, held that all acts of the legislature ultimately trumped what any judge might have deemed fundamental or constitutional.⁵² The English system was similar to American constitutionalism in the fact that judges had lifetime tenure, but it did not have a system where “sovereignty rests with the people who delegate the functions of government to three coordinate and independent bodies.”⁵³ The judges under the American system “define the separation and the limits”⁵⁴ of the powers the other branches are delegated with under the Constitution. Therefore, the Act of settlement of 1701 was an important step in instituting lifetime tenure as a foundation of judicial independence to assure judges would be able to “administer justice without fear or favor.”⁵⁵ In this respect, the Act of Settlement established “decisional” independence but not “institutional” independence.⁵⁶

⁵¹ Ibid.

⁵² Ibid.

⁵³ Carpenter, *Judicial Tenure*, 195.

⁵⁴ Ibid.

⁵⁵ Ibid., 205.

⁵⁶ Charles G. Geyh, and Emily Field Van Tassel, "The Independence of the Judicial Branch in the New Republic," *Chicago-Kent Law Review*, 74 (1998): 31.

During colonial times judges were not afforded the same independence as their British counterparts. In fact, in 1761 King George III would reduce judicial independence in the colonies to “tenure during the royal pleasure on the ground that the state of learning in the colonies was so low that it was with difficulty that men could be found competent to administer the judicial offices.”⁵⁷ Judges were viewed more as “presiding officials”⁵⁸ and were unable to make decisions under their own legal authority. An example of this took place in 1772 in Massachusetts when the King “established a fixed salary” for the superior judges in the colony, “thus preventing them from receiving their usual grants from the colonial legislature.”⁵⁹ This action aroused so much opposition that it would turn out to be one of the many grievances claimed by the colonies in the Declaration of Independence where they stated that King George III “has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.”⁶⁰ This would lead Americans “to believe they were being treated as second class subjects.”⁶¹ The lessons learned by the colonists from the battles with the crown over colonial judicial systems was that “the integrity of the judicial branch and the separate power it exercises can and will be undermined unless the judiciary is afforded a measure of institutional independence.”⁶² However, the colonies did not believe that institutional independence should mean “independence from the people.”⁶³ Simply put, the colonies believed the “problem was not judicial dependence per se but judicial dependence on the monarch.”⁶⁴ As

⁵⁷ Carpenter, *Judicial Tenure*, 2-3.

⁵⁸ Rakove, “The Original Justifications,” 1064.

⁵⁹ Sam J. Jr. Ervin, “Separation of Powers: Judicial Independence,” *Law and Contemporary Problems*, 35 (1970): 112.

⁶⁰ Ibid.

⁶¹ Rakove, “The Original Justifications,” 1064.

⁶² Geyh and Van Tassel, “The Independence of the Judicial Branch,” 36.

⁶³ Ibid.

⁶⁴ Ibid.

a result, they believed the best “solution to judicial dependence on the executive was not judicial independence, but judicial dependence on the legislature or the electorate.”⁶⁵

After the Revolutionary War, state constitutions attempted to remedy the position of the judiciary so that the courts would be a “recognized third department or branch of government.”⁶⁶ The theory of separation of powers was well known within the colonies and in many instances was “on paper well defined” in the early state constitutions, but “in practice, however, the case was very different.”⁶⁷ In these first constitutions, the main concern was to “make the judiciary independent of the executive, the branch of government with which it was historically associated.”⁶⁸ On the other hand, these constitutions gave the legislatures the final authority over judicial decisions thereby placing them on par with courts in England after the Glorious Revolution. “Independent tenure” for judges under this arrangement simply meant that a judge “could feel reasonably secure in their offices,” but not in the independent exercise of their powers.⁶⁹ Given the legislatively centered organization of the early state constitutions, this arrangement initially made sense to the Americans. The legislature was the branch that most closely resembled the people and therefore it occupied a privileged position in the constitutional scheme.

In the decade following the Revolutionary War, however, legislative supremacy proved problematic in republican government and many Americans became increasingly skeptical about whether this arrangement really promoted the ends of republicanism. Many state legislatures had given judges tenure during good behavior but maintained appointment and removal power.

⁶⁵ Ibid.

⁶⁶ Rakove, “The Original Justifications,” 1065.

⁶⁷ Carpenter, *Judicial Tenure*, 5.

⁶⁸ Ibid.

⁶⁹ Ibid.

Others imposed judicial term limits or made judges stand for reelection. These instances of legislative control over the judiciary brought about encroachments of power that often allowed the legislatures to trump the constitutions of the states.

The extent of the encroachments was perhaps most widespread in Vermont where the legislature had complete control over the judiciary. The legislature in this state could make rules, grant new trials, and even vacate judgments of the courts. In fact, the judiciary in Vermont refused to challenge the constitutionality of legislative acts, even ones that were repugnant to the state constitution.⁷⁰ Not all state legislatures went to this extreme, but this example “underscores how supremely trusting the fledgling states were of their legislatures and how little they had actually thought about separation of powers as it applied to the judicial branch.”⁷¹ When it came to governing, they were more concerned “upon making less of the executive and more of the legislative branch.”⁷²

As state legislative power increased, a profound shift in American legislative thinking took place. Instead of simply checking executive power, representative assemblies had to actually legislate and act in response to all the pressures and interests that swirl through republican governments like those the States had established.⁷³ This shift from the traditional conception of representative assemblies created abuses of legislative power and critics emerged. Leading political thinkers like James Madison and Thomas Jefferson became “the most acute

⁷⁰ Carpenter, *Judicial Tenure*, 9-10.

⁷¹ Geyh and Van Tassel, “The Independence of the Judicial Branch,” 37.

⁷² Ibid.

⁷³ Rakove, “The Original Justifications,” 1066.

critics of state lawmaking” and their “criticisms were fundamental to the agenda of constitutional reform.”⁷⁴

Before the Philadelphia convention of 1787, Madison “denounced the multiplicity, mutability, and most important, the injustice of legislation as one of the great vices of republican governance within the individual states.”⁷⁵ At the convention he observed that “experience in all states has evinced a powerful tendency in the legislature to absorb all power into its vortex” and he believed “this was the real source of danger to the American and state constitutions.”⁷⁶ After the convention, he wrote in defense of the Constitution in *Federalist 48* that the experience from the states demonstrates how “parchment barriers” were not enough to keep the legislative department from “everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.”⁷⁷ Jefferson was also troubled by legislative encroachments on the judiciary, especially in his own state of Virginia where he felt the “state judiciary lacked the independence needed to exercise judicial power without legislative branch interference.”⁷⁸ He stated in his *Notes on the State of Virginia* that “under the Virginia Constitution, the judiciary members were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it.”⁷⁹

The history of events leading up to the Constitutional Convention “created a perceived need for judges to be independent individually as decision makers, and collectively as a separate

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ervin, “Separation of Powers,” 113.

⁷⁷ James Madison, “Federalist 48,” *The Federalist*, ed. Jacob E. Cooke (Middletown, CT: Wesleyan University Press, 1961), 333.

⁷⁸ Geyh and Van Tassel, “The Independence of the Judicial Branch,” 38.

⁷⁹ Ibid.

branch of government.”⁸⁰ Since most of the threats to the judicial branch leading up to the convention were “largely confined to issues of judicial tenure and salary protection,”⁸¹ the focus of protecting judicial independence rested on these two subjects. It is therefore unsurprising that “comparatively little attention was paid to other ways in which the legislature could compromise the judicial branch.”⁸² The difficulty independent judges had in resisting legislative “encroachments on their institutional independence”⁸³ would lead to a rise in support of an apparent remedy to this problem; judicial review. The argument for this remedy developed from the idea “that an independent judiciary was needed to exercise judicial review and that judicial review was needed to preserve an independent judiciary.”⁸⁴

The delegates at the Constitutional Convention of 1787 were committed to an independent judicial branch. The disappointing experiences of judicial dependence on the crown prior to the Revolution and the equally disappointing encounters with judicial dependence on the state legislatures after the Revolution led to the desire for an improved system of judicial independence. The Constitution that came out of the convention created an independent judiciary primarily by granting judges lifetime tenure and salary protections that would “affect both decisional independence of individual judges and the institutional independence of the judiciary as a whole.”⁸⁵ It laid the political foundation of judicial independence, which can be considered an “ideal state” of the judicial branch of government that allows it to work free from ideological influences.⁸⁶ However, it remained the object of the courts to secure a co-equal status with the other branches of government and create an institution that could “protect the

⁸⁰ Ibid.

⁸¹ Ibid., 40.

⁸² Ibid., 38.

⁸³ Ibid., 40.

⁸⁴ Ibid., 39.

⁸⁵ Jackson, *Packages of Judicial Independence*, 967.

⁸⁶ Joseph M. Hood, “Judicial Independence,” *Cleveland State Law Review*, 23, no. 1 (2013): 138.

people against intrusive government and the misappropriation of power”⁸⁷ by both the executive and legislature.

The ratification debates that followed the Constitutional Convention “reflect an appreciation for the tension and balance created between judicial accountability and independence.”⁸⁸ Discussions of judicial independence continued to revolve around tenure and salary protections. The question was whether they would, as Brutus believed, seal off the judiciary from the other branches and make them completely independent or if they would, as Publius believed, protect the judiciary and ultimately the people from encroachments from the other branches.

Brutus argued that, while the English system grants lifetime tenure to judges, it does so for reasons that do not fit the American system. In England, judicial independence is necessary in order to prevent the abuse of power by a hereditary Crown while judges were assigned lifetime tenure during good behavior so “that they may be placed in a situation, not to be influenced by the crown.”⁸⁹ America, by contrast, is a republic and has none of the monarchical features of England that might justify lifetime tenure for judges. Consequently, it made no sense to grant such a tenure to judges in America since it would only isolate them from a form of authority that we are not really free to deny – the people.⁹⁰

The Constitution’s departure from true republican principles was best illustrated according to Brutus to the more republican aspects of the English system as well. He detailed how English judges do “hold their offices during good behavior,” but he concluded that the

⁸⁷ Rosen and Harding, “Reflections upon Judicial Independence,” 791.

⁸⁸ Geyh and Van Tassel, “The Independence of the Judicial Branch,” 50-51.

⁸⁹ Brutus, “Brutus XV,” *The Anti-Federalist*, 184.

⁹⁰ Brutus, “Brutus XI,” *The Anti-Federalist*, 163.

similarity ended there because the judge's decisions "are subject to correction by the house of lords," and therefore "are under control of the legislature."⁹¹ Brutus came to the conclusion that the framers attempted to follow the constitution of Britain by "rendering judges independent", and he makes a very important point about not objecting "to the judges holding their commissions during good behavior." In fact, he states that this is a "proper provision" as long as the judges are held accountable for their decisions. He does not deem this to be the case.⁹²

Brutus concludes with a dire prediction of the fate of this institution once judges are granted lifetime tenure. Once set in action, the popular branches will be unable to control it. He reiterates that judges should hold their offices during good behavior, but "the reasons in favor of this establishment of the judges in England, do by no means apply to this country."⁹³ This was an important step toward individual autonomy as it deprived the crown "of one of the most powerful engines with which it might enlarge the boundaries of the royal prerogative and encroach on the liberties of the people."⁹⁴

According to Brutus, the purpose of lifetime tenure under the proposed Constitution does not apply to the English premise. The courts in America will be "placed beyond all account more independent, so much so as to be above control."⁹⁵ Brutus contended that "the essence of republican government was accountability" and the only exception to this rule was the Supreme Court, as they would "not be answerable to anybody at all."⁹⁶ In fact, he would contend that the

⁹¹ Brutus, "Brutus XV," *The Anti-Federalist*, 183.

⁹² Ibid.

⁹³ Ibid., 184.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Schlomo Slonim, "Federalist No. 78 and Brutus' Neglected Thesis on Judicial Supremacy," *Constitutional Commentary*, 23 (2006): 17.

“judges under this system will be independent in the strict sense of the word”⁹⁷ and this will lead to the power of this court being “superior to that of the legislature.”⁹⁸

The level of trepidation among the Antifederalists is only equaled by the degree of resolution on the part of *The Federalist Papers* for the judiciary as proposed in the new Constitution -- “one of the most valuable of the modern improvements in the practice of government.”⁹⁹ In England, the judiciary was “an excellent barrier to the despotism of a prince;” in America it will be a limit on the despotism of whimsical majorities.¹⁰⁰ Even some state governments, Publius reports, had devised similar judicial constitutions. According to Publius, the federal constitution’s judiciary was “conformable to the most approved of the state constitutions” and an “excellent barrier to the encroachments and oppressions of the representative body.”¹⁰¹ If the design is good enough for the established governments of England and the representative states, then why is it not good enough for the proposed state? The question has been drawn by the “adversaries of the plan”, and “is no light symptom of the rage for objection which disorders their imaginations and judgments.”¹⁰² Publius considers this to be a specious argument as this type of judiciary in fact “is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.”¹⁰³

Publius even went a step further in his belief that an independent judiciary with protections for tenure in office and also salaries was the most important contribution toward the

⁹⁷ Brutus, "Brutus XV," *The Anti-Federalist*, 184.

⁹⁸ *Ibid.*, 185.

⁹⁹ Hamilton, "Federalist 78", *The Federalist*, 522.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

establishment of federal courts under the new Constitution.¹⁰⁴ He bolsters the claim of permanency in office with the summation that “inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated or by whomsoever made, would, in some way or other, be fatal to their necessary independence.”¹⁰⁵ He concluded with sincerity and maybe some flattery toward the motive of the idea of tenure during good behavior coming from the state constitutions¹⁰⁶ by noting that “there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established good behavior as the tenure of their judicial offices.”¹⁰⁷

The opinion that there is a “supposed danger of judiciary encroachments on the legislative authority”, according to Publius, “is in reality a phantom.”¹⁰⁸ Publius argues that the judiciary “from the nature of its functions”¹⁰⁹ will always be “the weakest of the three departments of power.”¹¹⁰ In this respect, he pushes the argument against any type of legislative interference being present within the power and scope of the judicial branch. This goes against the notion of government present in England and some of the states, but Publius sees this as an improvement on the vision of a republican government because “liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other

¹⁰⁴ Jackson, “*Packages of Judicial Independence*”, 986.

¹⁰⁵ Hamilton, “Federalist 78”, *The Federalist*, 529.

¹⁰⁶ Michael G. Collins, “Judicial Independence and the Scope of Article III - A View from the Federalist,” *University of Richmond Law Review*, 38 (2004): 675-704,

¹⁰⁷ Hamilton, “Federalist 78”, *The Federalist*, 530.

¹⁰⁸ Hamilton, “Federalist 81”, *The Federalist*, 545.

¹⁰⁹ *Ibid.*, 522.

¹¹⁰ *Ibid.*, 523.

departments.”¹¹¹ The judicial branch has neither “the sword nor the purse”¹¹² and therefore is the “least dangerous”¹¹³ of the three branches proposed by the new Constitution. In the event that the judiciary might abuse its power, Publius supposes that the power of impeachment is enough to give the legislature security from the “danger that the judges, by a series of deliberate usurpations on the authority of the legislature, would hazard the united resentment of the body entrusted with it.”¹¹⁴ It is encroachments by that “impetuous vortex”¹¹⁵ of legislative power on the judiciary that is the real threat. Publius and others view “the legislature as the most dangerous department of government because of its close ties to the people.”¹¹⁶ These close ties could “enable the representatives of the people to substitute their will to that of their constituents.” For this reason Publius has faith that “the courts were designed to be an intermediate body between the people and the legislature”¹¹⁷ and “the bulwarks of a limited constitution against legislative encroachments.”¹¹⁸ He deems this to be one of the strongest arguments “for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges.”¹¹⁹

Lifetime tenure was put in place to guarantee that judges remained “independent of popular passions and certain kinds of pressures from the other branches.”¹²⁰ It was also put in place “not to benefit the judges”¹²¹, but to safeguard the people and “ensure that the judge is

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid., 522.

¹¹⁴ Hamilton, “Federalist 81”, *The Federalist*, 546.

¹¹⁵ Madison, “Federalist 48”, *The Federalist*, 333.

¹¹⁶ John Ferejohn, “Independent Judges, Dependent Judiciary: Explaining Judicial Independence,” *Southern California Law Review*, 72 (1998): 378.

¹¹⁷ Hamilton, “Federalist 78”, *The Federalist*, 525.

¹¹⁸ Ibid., 526

¹¹⁹ Ibid., 527.

¹²⁰ Jackson, “*Packages of Judicial Independence*”, 1006.

¹²¹ Ibid., 987.

perfectly and completely independent, because the judge may have to decide between the Governments and the man whom the Government is prosecuting; between the most powerful individual in the community and the poorest and most unpopular.”¹²² “Indeed, the Founders envisioned judicial independence as a means of ensuring accountability not to partisan clamor of the day, but to lasting legal principles that were to be neutrally applied to all members of the community.”¹²³ Brutus would argue the power given to the judiciary “will enable them to mould the government, into almost any shape they please.”¹²⁴ Publius would counter that with “neither force nor will, but merely judgment” the judiciary would be the weakest and the “least dangerous.”¹²⁵

The constitutional checks on the judiciary, such as the powers of the legislature to appropriate court funds and the authority to create federal courts; and the executive’s authority to enforce court rulings and to appoint judges, create an independent judicial branch that is “dependent on the willingness of the popular branches of government to refrain from using their ample constitutional powers to infringe on judicial authority.”¹²⁶ In the end, the reality of judicial independence and the ability of the judiciary to resist encroachments is determined by branch interdependence working to limit confrontations, while allowing each to perform its duties within the institutional framework of the Constitution.¹²⁷ “Life tenure and salary protections would count for little on a bench whose mandates were ignored or whose budget had been cut to the point where daily administration was impossible.”¹²⁸ Congress and the executive,

¹²² Ibid.

¹²³ Carmen Beauchamp Ciparick, and Bradley T. King, "Judicial Independence: Is it Impaired or Bolstered by Judicial Accountability?," *St. John's Law Review*, 84, no. 1 (2010): 8.

¹²⁴ Brutus, "Brutus XI," *The Anti-Federalist*, 167.

¹²⁵ Hamilton, "Federalist 78", *The Federalist*, 522-523.

¹²⁶ Ferejohn, "Independent Judges, Dependent Judiciary," 382.

¹²⁷ Ferejohn and Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint," 1039.

¹²⁸ Ibid., 994.

therefore, have sufficient means to stifle the independence of the judiciary while the “courts boast no comparable power to hit back.”¹²⁹ In the end, the judicial branch would prove to be “the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them.”¹³⁰

The merits of the arguments between the Federalists and Antifederalists over the power, function and independence of the Supreme Court would remain to be resolved by the court’s subsequent conduct over the course of American history. Faced with an imminent and dangerous threat to the power of the judiciary, the Supreme Court, under John Marshall, would first exercise its authority to review statutes and to interpret the Constitution in the famous case of *Marbury v Madison* (1803). The power of judicial review was not the invention of the Chief Justice or an expansion of judicial authority. He simply gave judicial review “the font of theoretical justification”¹³¹ within an independent judicial branch. In fact, the historical evidence shows that the Framers “clearly viewed judicial review as a check against legislative abuse” and even “justified the doctrine as the ministerial judicial enforcement of the people’s obvious will.”¹³² Following the court’s decision in *Marbury*, the debate over judicial review, with a few exceptions, remained fairly quiet until the middle of the twentieth century when the court began to take up cases that involved controversial issues over the status of individual rights. The lesson plans that follow this introduction offer an opportunity for students to reflect on this debate over judicial review in light of those controversial decisions.

¹²⁹ Ibid.

¹³⁰ Hamilton, “Federalist 78”, *The Federalist*, 522.

¹³¹ William R. Casto, “James Iredell and the American Origins of Judicial Review,” *Connecticut Law Review*, 27, no. 2 (1995): 329.

¹³² Ibid., 363.

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Publius vs. Brutus and the Debate over the “Least Dangerous” Branch

Lesson 1 – Publius vs. Brutus: Arguments over the Independence, Role and Function of the Judicial Branch in the American Political System

Introduction

Immediately after the Constitution had been signed in Philadelphia on September 17, 1787, the Antifederalists began flooding the New York newspapers with objections to the proposed plan of government. The Antifederalists' passionate protests initially proved successful as they received they captured much of the nation's attention as the state ratifying conventions were being organized. Not until late into the debate over ratification did the Federalists begin to respond to these objections and turn the tide towards ratification in a few key states. The most famous of these responses to the Antifederalists was a series of eighty-five essays written by John Jay, James Madison and Alexander Hamilton; now called [*The Federalist Papers*](#). In these essays the writers took the pseudonym of Publius, the Roman citizen who was credited with saving Roman republicanism. Over the course of the eighty-five published papers, the authors set out to defend the proposed Constitution.

Among the most famous Antifederalists, Robert Yates writing under the pseudonym Brutus, attacked many aspects of the proposed plan of government. In January of 1788 Brutus began a critical analysis of the judicial branch of the Constitution as defined by [Article III](#) of the proposed Constitution. Brutus's attack on the Judiciary provoked a sharp response from the authors of *The Federalist Papers* – an exchange that today constitutes one of the most insightful and prophetic debates on the power, role and function of the judiciary.

This lesson will focus on the debate about the proposed judicial branch and the challenges the Founders faced in creating an independent judiciary. For the Federalist and Antifederalists, the central concern over Article III was the independence of the judges and their power to review the constitutionality of legislation. Given that judges were appointed for life and their decisions could not be reviewed by another elected branch of government, Brutus feared that their decisions would be “independent of heaven itself.” Publius, by contrast, argued that the court's role would be benign, the judiciary having neither “force nor will but merely judgment.” The Judiciary, according to [Federalist 78](#) will always be “the least dangerous branch.” By examining the contrasts between these two writers, students will gain a better understanding of the original arguments about the proper role of the courts and the framework for a discussion of whether the court today has exceeded its original intent.

Guided Questions

- What are Brutus's fears about the power of the judiciary in relation to Congress and the States?

- What are the merits to Brutus’s view that the judicial branch under the Constitution will be “independent of heaven itself?”
- Why does Publius believe that the judiciary is the “least dangerous branch?”
- What are the merits to Publius’s argument that the judiciary will exercise only “judgment?”

Learning Objectives

After completing this lesson students will be able to:

- Explain how British and colonial history helped to define the role and function of the judiciary under the proposed Constitution.
- Explain the differences in the arguments between Publius and Brutus on the advantages and dangers of judicial independence under the proposed Constitution.
- Explain the opportunities and limitations of the judiciary as a political branch of government.

Background

For detailed background information on the Federalist and Antifederalist debates and the Ratification debates in the states, teachers should examine the website [Teaching American History](#). This website offers a comprehensive study of these debates along with other valuable resources.

The emergence of an independent judiciary within American constitutionalism had many precedents in English history. The history of judicial independence, in terms of lifetime tenure, can be traced back to English Parliament’s [Act of Settlement of 1701](#), which established that royal judges should serve during good behavior, and not at the King’s pleasure. Before the passage of the Act, royal judges were often treated as pawns of the King. The courts were at that time perceived as mere representatives of the crown and not as independent entities of mediation. The Act of Settlement gave some individual independence to the judges of England by granting them what would be considered lifetime tenure. They were free to make judicial decisions based on the law and not on the premise that the King held their political life in his hands.

Securing the independence of individual judges, however, did not mean that the judiciary had become a separate, independent department of government. They were still viewed as part of the executive branch, and the legislative branch could supersede their decisions. Common law jurisprudence, which was the British doctrine of the period, held that all acts of the legislature ultimately trumped what any judge might have deemed constitutional. The English system was similar to American constitutionalism in the fact that judges had lifetime tenure, but it did not have a system where sovereignty rested with the people. The Act of Settlement, therefore, was an important step in instituting lifetime tenure as a foundation of judicial independence.

During colonial times judges were not afforded the same independence as their British counterparts. In fact, in 1761 King George III would reduce judicial independence in the colonies to tenure during royal pleasure and judges were viewed more as “presiding officials”

and were unable to make decisions under their own legal authority. This would turn out to be one of the many grievances against the King claimed by the colonies in the [Declaration of Independence](#). The lessons learned by the colonists from the battles with the crown over colonial judicial systems was important in creating an independent judiciary. It did not, however, lead to complete independence as the colonies believed that the people or the agents of the people should have the final say on judicial matters.

After the Revolutionary War, state constitutions attempted to remedy the position of the judiciary by establishing independent branches within their government structures. The theory of separation of powers was well known within the colonies on paper but not necessarily in practice. In these first constitutions, the main concern was to keep the power of the judicial branch separate from the executive. On the other hand, these constitutions often gave the legislatures substantial control over the salaries of judges and even their decisions. Given the legislatively centered organization of the early state constitutions, this arrangement initially made sense to the Americans given their Whig preference for a democratically elected legislature. The legislature was thought to be the part of government that most closely resembled the people and therefore it occupied a privileged position in the constitutional scheme.

In the decade following the Revolutionary War, however, legislative supremacy proved problematic in republican government and many Americans became increasingly skeptical about whether this arrangement really promoted the ends of republicanism. Many state legislatures had given judges tenure during good behavior but maintained appointment and removal power. Others imposed judicial term limits or made judges stand for reelection. These instances of legislative control over the judiciary brought about encroachments of power that often allowed the legislatures to undermine the constitutions of the states. Critics of legislative supremacy emerged and leading political thinkers like James Madison and Thomas Jefferson were out front in their opposition and this would lead to a fundamental shift in constitutional reform.

At the Philadelphia convention of 1787, Madison observed that “experience in all states has evinced a powerful tendency in the legislature to absorb all power into its vortex” and he believed “this was the real source of danger to the American and state constitutions.” After the convention, he wrote in defense of the Constitution in [Federalist 48](#) that the experience from the states demonstrates how “parchment barriers” were not enough to keep the legislative department from “everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex.” Jefferson was also troubled by legislative encroachments on the judiciary, especially in his own state of Virginia where he felt the “state judiciary lacked the independence needed to exercise judicial power without legislative branch interference.” He stated in his [Notes on the State of Virginia](#) that “under the Virginia Constitution, the judiciary members were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it.”

The history of events leading up to the [Constitutional Convention of 1787](#) created a need for judicial independence and the delegates at the Convention were committed to an independent judicial branch. The disappointing experiences of judicial dependence on the crown prior to the Revolution and the equally disappointing encounters with judicial dependence on the state legislatures after the Revolution led to the desire for an improved system of judicial

independence. The Constitution that emerged from the Philadelphia Convention created an independent judiciary primarily that granted judges lifetime tenure and salary protections.

The ratification debates that followed the Constitutional Convention are important to understanding the tensions created by the emergence of a constitutionally independent judicial branch. Discussions of judicial independence continued to revolve around the proposed tenure and salary protections under Article III. The question was whether the Constitution would, as Brutus believed, undermine republican government by rendering the judiciary independent of heaven itself, or if it would, as Publius believed, protect the people by preventing other branches from subverting the fundamental law.

Brutus argued in his Antifederalist writings, that while the English system grants lifetime tenure to judges, it does so for reasons that do not fit the American system. In England, judicial independence is necessary in order to prevent the abuse of power by a hereditary monarch while judges were assigned lifetime tenure during good behavior so they would not be influenced by the crown. America, by contrast, is a republic and has none of the monarchical features of England that might justify lifetime tenure for judges. Consequently, to Brutus, it made no sense to grant such tenure to judges in America since it would only isolate them from a form of authority that we are not really free to deny – the people.

The Constitution's departure from true republican principles was best illustrated, according to Brutus, by the more republican aspects of the English system. He detailed how English judges do "hold their offices during good behavior," but he concluded that the similarity ended there because the judge's decisions "are subject to correction by the house of lords," and therefore "are under control of the legislature." Brutus came to the conclusion that the Framers attempted to follow the constitution of Britain by "rendering judges independent", and did not object "to the judges holding their commissions during good behavior." In fact, he states that this is a "proper provision" as long as the judges are held accountable for their decisions. He does not deem this to be the case.

According to Brutus, the purpose of lifetime tenure under the proposed Constitution does not apply to the English premise. The courts in America will be "placed beyond all account more independent, so much so as to be above control." Brutus contended that "the essence of republican government was accountability" and the only exception to this rule was the Supreme Court, as they would "not be answerable to anybody at all." In fact, he would contend that the "judges under this system will be independent in the strict sense of the word" and this will lead to the power of this court being "superior to that of the legislature."

The level of trepidation among the Antifederalists is only equaled by the degree of resolution on the part of [*The Federalist Papers*](#) for the judiciary as proposed in the new Constitution -- "one of the most valuable of the modern improvements in the practice of government." In England, the judiciary was "an excellent barrier to the despotism of a prince;" in America it will be a limit on the despotism of whimsical majorities. Even some state governments, Publius reports, had devised similar judicial constitutions. According to Publius, the federal constitution's judiciary was "conformable to the most approved of the state constitutions" and an "excellent barrier to the encroachments and oppressions of the representative body." If the design is good enough for

the established governments of England and the representative states, then why is it not good enough for the proposed state? Publius believes this type of judiciary in fact “is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.”

Publius even went a step further in his belief that an independent judiciary with protections for tenure in office and also salaries was the most important contribution toward the establishment of federal courts under the new Constitution. He bolsters the claim of permanency in office with the summation that “inflexible and uniform adherence to the rights of the Constitution and of individuals, which we perceive to be indispensable in the courts of justice can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated or by whomsoever made, would, in some way or other, be fatal to their necessary independence.”

The opinion that there is a “supposed danger of judiciary encroachments on the legislative authority”, according to Publius, “is in reality a phantom.” He argues that the judiciary “from the nature of its functions” will always be “the weakest of the three departments of power.” In this respect, he pushes the argument against any type of legislative interference being present within the power and scope of the judicial branch. This goes against the notion of government present in England and some of the states, but Publius sees this as an improvement on the vision of a republican government because “liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments.” The judicial branch, he states, has neither “the sword nor the purse” and therefore is the “least dangerous” of the three branches proposed by the new Constitution.

It is encroachments by that “impetuous vortex” of legislative power on the judiciary that is the real threat. Publius and others view “the legislature as the most dangerous department of government because of its close ties to the people.” These close ties could “enable the representatives of the people to substitute their will to that of their constituents.” For this reason, he has faith that “the courts were designed to be an intermediate body between the people and the legislature” and “the bulwarks of a limited constitution against legislative encroachments.” He deems this to be one of the strongest arguments “for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges.”

Lifetime tenure was put in place to guarantee that judges remained “independent of popular passions and certain kinds of pressures from the other branches.” It was also put in place not to benefit the judges but to safeguard the people. The Founders envisioned judicial independence as a lasting legal principle that would protect all members of the community. The Constitution, Brutus would argue, gives power to the judiciary that “will enable them to mould the government, into almost any shape they please.” Publius would counter that with “neither force nor will, but merely judgment” the judiciary would be the weakest and the “least dangerous.”

In the end, the reality of judicial independence and the ability of the judiciary to resist encroachments is determined by how the branches work together to limit confrontations, while still performing their duties within the institutional framework of the Constitution. Congress and the executive do have sufficient means to stifle the independence of the judiciary with the power

of the “purse” and “sword.” The judicial branch has no means to fight back and would prove to be, as Publius stated in [Federalist 78](#), “the least dangerous to the political rights of the constitution, because it will be least in a capacity to annoy or injure them.”

Preparation Instructions

Review the lesson plan and locate and bookmark suggested materials and links from the websites. Download and print out selected documents and duplicate copies as necessary for student viewing. Alternatively, excerpted versions of these documents are available at the end of these lessons along with questions for each activity.

Teachers will need to read the background and the documents to fully understand the concepts involved in the lesson. Students will be asked to read the documents as part of the activities involved in the lesson and will get a better understanding of the debate between Publius and Brutus over judicial independence

Analyzing Primary Sources

If your students lack experience in dealing with primary sources, you might use one or more preliminary exercises to help them develop these skills. [The Learning Page](#) at the [American Memory Project of the Library of Congress](#) includes a set of such activities. Another useful resource is the [Digital Classroom of the National Archives](#), which features a set of [Document Analysis Worksheets](#). Finally, [History Matters](#) offers pages on ["Making Sense of Maps"](#) and ["Making Sense of Oral History"](#) which give helpful advice to teachers in getting their students to use such sources effectively.

Lesson Activities

Activity 1 – The History of Judicial Independence

The history of judicial independence shows a growth in scope from the Act of Settlement of 1701 up to the Constitutional Convention of 1787. In looking at the primary documents involved, what changes occurred to the independence of the judiciary in American constitutionalism during this period? Students will do a close textual analysis of the documents in groups or alone and fill in the chart to compare the documents. Documents included will be:

- [The Act of Settlement of 1701](#) (excerpt on judicial independence)
- [The Declaration of Independence](#) (excerpt of the grievance against the King)
- [Federalist 48](#) (Madison’s excerpt on legislative supremacy)
- [Notes on the State of Virginia](#) (Jefferson’s excerpt on legislative authority)

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What does it mean for judges to hold their offices “during good behavior” and how does this relate to judicial independence? What would happen to independence if judges could be removed for bad decisions or age restrictions?
- How was judicial independence in colonial America different from independence in England? Why were Americans upset at the King’s authority over the judges in the colonies?
- What does James Madison mean by an “impetuous vortex” of legislative power? What reasons does Madison give for the danger of legislative encroachments on the judiciary? Why does Thomas Jefferson believe judges are dependent on the legislature in the state of Virginia?

Activity 2 – The Debate between Publius and Brutus

The debate between Publius and Brutus shows two sides to the argument over the proposed judicial branch under the Constitution. In looking at key excerpts of the writings of these two, what are the main arguments made by both in response to judicial independence? Students will examine key excerpts from [Federalist 78](#) and [Brutus XV](#) and do a close textual analysis of the differences between the two arguments. Students will fill out a chart to compare the arguments.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What are the key aspects of Publius’ argument that the judicial branch of government under the proposed Constitution will be the “least dangerous” of the three branches?
- What are the key aspects of the arguments of Brutus that the judicial branch under the Constitution will be “independent of heaven itself” and will actually be supreme to the legislative branch?

Activity 3 – Interpretation of Article III of the Constitution

The debates between Publius and Brutus define some specific arguments when it comes to the interpretation of the powers given to the judicial branch under [Article III](#). What specific arguments does each writer make in regard to the actual words of [Article III of the Constitution](#)? Students will examine the writings of Brutus and Publius and do a close textual analysis of the differing views of key parts of Article III. Students will fill out a chart to compare the arguments.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What checks are given specifically to the other branches in Article III in regard to the power and function of the judicial branch?
- Both men claim that the judicial branch will have the power of “judicial review.” What specific part of Article III infers this power, if any?

Assessment

Teachers should have students do the first assessment below to examine student understanding of the debate between Publius and Brutus. The second assessment may be used as an extra assessment or as an alternative assessment for students with lesser abilities or reading level.

Assessment 1 - The students will read [Federalist 78](#) and [Brutus XV](#) and compare the arguments made by the two writers and compose the following argumentative essay:

- Write an argumentative essay deciding which writer makes the best case for the scope of judicial independence under the proposed Constitution of the United States. Was Brutus right in his assumption that the judicial branch would be “independent of heaven itself” and will be the most supreme of the three branches or was Publius right in stating that the judiciary would “have neither force nor will” and would therefore be the “least dangerous” of the three branches? Make sure to use quotes and examples from the writings to support your side and refute the other side. The assessment rubric is included.

Assessment 2 - The students will read [Article III of the Constitution](#) and answer the following questions:

- What powers are given to the Supreme Court in Article III of the Constitution?
- Does Article III establish any limitations on the Court’s power? If yes, what are they?
- What does Publius mean when he says the legislative branch has the power of the “purse” and the executive branch has the power of the “sword”? How does this relate to judicial powers under Article III?
- What, if any, other powers are given to the other branches over the judicial branch in Article III of the Constitution?

Extending the Lesson

Students should be encouraged to read [Federalist 79-83](#) to get a better understanding of the full argument made by Publius on the independence, power and function of the judicial branch of government. Students should also read *Brutus* [XI](#), [XII](#), [XIII](#), [XIV](#) and [XVI](#) in order to compare the arguments made by both writers.

Students can also write a persuasive essay on judicial independence by using the following quote from Chief Justice William Renquist:

- In a 1996 speech at the law school of American University, the Chief Justice call judicial independence “one of the crown jewels of our system of government.” Do you agree or disagree with this statement? Use the arguments of Publius and/or Brutus to make your case.

Selected Websites and Documents

Teaching American History

- [The Federalist Papers](#)

- [Federalist 48](#)
- [Federalist 78](#)
- [Federalist 79-83](#)
- [Brutus XV](#)
- [Brutus XI-XIV and XVI](#)
- [Declaration of Independence](#)

The Avalon Project

- [Article III of the U.S. Constitution](#)

The Founders Constitution

- [Thomas Jefferson – Notes on the State of Virginia](#)

The Jacobite Heritage

- [The Act of Settlement of 1701](#)

The Basics

Grade Level

- 9-12

Time Required

- 3 to 5 class periods

Subject Areas

- History, Social Studies
 - U.S. Constitution
 - U.S. History
 - Government
 - Political Science
 - AP U.S. History, Government

Skills

- Critical analysis
- Critical thinking
- Discussion
- Evaluating arguments
- Gathering, classifying and interpreting written, oral and visual information
- Historical analysis
- Interpretation
- Making inferences and drawing conclusions
- Using primary sources

Lesson Resources

Text documents (attached on the following pages)

Student Activities (attached on the following pages)

Assessments (attached on the following pages)

Activity 1 – The History of Judicial Independence

The history of judicial independence shows a growth in scope from the [Act of Settlement of 1701](#) up to the Constitutional Convention of 1787. In looking at the primary documents involved, what changes occurred to the independence of the judiciary in American constitutionalism during this period? Students will do a close textual analysis of the documents in groups or alone and fill in the chart to compare the documents.

Directions: Read the documents that follow and use them to answer the comparison question in box two.

<u>Document</u>	<u>Comparison Question</u>
The Act of Settlement of 1701	What does judicial independence mean according to this document?
The Declaration of Independence	How did judicial independence change from the Act of Settlement of 1701?
Federalist 48	What is James Madison's biggest concern when it comes to judicial independence?
Notes on the State of Virginia	How does Thomas Jefferson view judicial independence in the State of Virginia?

Discussion Questions for Activity 1

Directions: After reading the documents and comparing the changes that have taken place historically in regard to judicial independence, use your knowledge from the documents to answer the following questions. Make sure to write your answers in paragraph form on a separate sheet of paper.

- What does it mean for judges to hold their offices “during good behavior” and how does this relate to judicial independence? What would happen to independence if judges could be removed for bad decisions or age restrictions?
- How was judicial independence in colonial America different from independence in England? Why were Americans upset at the King’s authority over the judges in the colonies?
- What does James Madison mean by an “impetuous vortex” of legislative power? What reasons does Madison give for the danger of legislative encroachments on the judiciary? Why does Thomas Jefferson believe judges are dependent on the legislature in the state of Virginia?

Document 1

Act of Settlement of 1701 (excerpt)

Judicial Independence

That after the said limitation shall take effect as aforesaid, no person born out of the Kingdoms of England, Scotland, or Ireland, or the dominions thereunto belonging (although he be naturalized or made a denizen, except such as are born of English parents) shall be capable to be of the Privy Council, or a member of either House of Parliament, or to enjoy any office or place of trust, either civil or military, or to have any grant of lands, tenements or hereditaments from the Crown, to himself or to any other or others in trust for him;

That no person who has an office or place of profit under the King, or receives a pension from the Crown, shall be capable of serving as a member of the House of Commons;

That after the said limitation shall take effect as aforesaid, judges commissions be made *quamdiu se bene gesserint* (while they behave themselves), and their salaries ascertained and established; but upon the address of both Houses of Parliament it may be lawful to remove them;

That no pardon under the Great Seal of England be pleadable to an impeachment by the Commons in Parliament.

IV. And whereas the laws of England are the birth-right of the people thereof, and all the Kings and Queens, who shall ascend the throne of this Realm, ought to administer the government of the same according to the said laws, and all their officers and ministers ought to serve them respectively according to the same: the said Lords Spiritual and Temporal, and Commons, do therefore further humbly pray, That all the laws and statutes of this Realm for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, may be ratified and confirmed, and the same are by His Majesty, by and with the advice of the said Lords Spiritual and Temporal, and Commons, and by authority of the same, ratified and confirmed accordingly.

Document 2

Declaration of Independence (excerpt)

July 4, 1776

IN CONGRESS, July 4, 1776

The unanimous Declaration of the thirteen united States of America,

When in the Course of human events...

We hold these truths to be self-evident...

The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

In every stage of these Oppressions...

We, therefore, the Representatives of the united States of America...

Document 3

Federalist No. 48

Publius (James Madison)

These Departments Should Not Be So Far Separated As To Have No Constitutional Control Over Each Other

February 01, 1788

IT was shown in the last paper that the political apothegm there examined does not require that the legislative, executive, and judiciary departments should be wholly unconnected with each other. I shall undertake, in the next place, to show that unless these departments be so far connected and blended as to give to each a constitutional control over the others, the degree of separation which the maxim requires as essential to a free government, can never in practice be duly maintained.

It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it. After discriminating, therefore, in theory, the several classes of power, as they may in their nature be legislative, executive, or judiciary, the next and most difficult task is to provide some practical security for each, against the invasion of the others. What this security ought to be is the great problem to be solved.

Will it be sufficient to mark, with precision, the boundaries of these departments in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble against the more powerful members of the government. The legislative department is every where extending the sphere of its activity and drawing all power into its impetuous vortex.

The founders of our republics have so much merit for the wisdom which they have displayed that no task can be less pleasing than that of pointing out the errors into which they have fallen. A respect for truth, however, obliges us to remark that they seem never for a moment to have turned their eyes from the danger, to liberty, from the overgrown and all-grasping prerogative of an hereditary magistrate, supported and fortified by an hereditary branch of the legislative authority. They seem never to have recollected the danger from legislative usurpations, which, by assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations.

In a government where numerous and extensive prerogatives are placed in the hands of a hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire. In a democracy, where a multitude of people exercise in person the legislative functions and are continually exposed, by their incapacity for regular deliberation and concerted measures, to the ambitious intrigues of their executive magistrates, tyranny may well be apprehended, on some favorable emergency, to start up in the same quarter. But in a representative republic where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

The legislative department derives a superiority in our governments from other circumstances. Its constitutional powers being at once more extensive, and less susceptible of precise limits, it can, with the greater facility, mask, under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments. It is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere. On the other side, the executive power being restrained within a narrower compass and being more simple in its nature, and the judiciary being described by landmarks still less uncertain, projects of usurpation by either of these departments would immediately betray and defeat themselves. Nor is this all: as the legislative department alone has access to the pockets of the people, and has in some constitutions full discretion, and in all a prevailing influence, over the pecuniary rewards of those who fill the other departments, a dependence is thus created in the latter, which gives still greater facility to encroachments of the former.

I have appealed to our own experience for the truth of what I advance on this subject. Were it necessary to verify this experience by particular proofs, they might be multiplied without end. I might collect vouchers in abundance from the records and archives of every State in the Union. But as a more concise and at the same time equally satisfactory evidence, I will refer to the example of two States, attested by two unexceptionable authorities.

The first example is that of Virginia, a State which, as we have seen, has expressly declared in its constitution that the three great departments ought not to be intermixed. The authority in support of it is Mr. Jefferson, who, besides his other advantages for remarking the operation of the government, was himself the chief magistrate of it. In order to convey fully the ideas with which his experience had impressed him on this subject, it will be necessary to quote a passage of some length from his very interesting *Notes on the State of Virginia*, p. 195. **“All the powers of government, legislative, executive, and judiciary, result to the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that**

they are chosen by ourselves. An *elective despotism* was not the government we fought for; but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy as that no one could transcend their legal limits without being effectually checked and restrained by the others. For this reason that convention which passed the ordinance of government laid its foundation on this basis, that the legislative, executive and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. *But no barrier was provided between these several powers.* The judiciary and executive members were left dependent on the legislative for their subsistence in office, and some of them for their continuance in it. If, therefore, the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can be effectual; because in that case they may put their proceeding into the form of an act of Assembly, which will render them obligatory on the other branches. They have accordingly *in many instances, decided rights* which should have been left to *judiciary controversy*, and *the direction of the executive, during the whole time of their session, is becoming habitual and familiar.*”

The other State which I shall take for an example is Pennsylvania; and the other authority, the Council of Censors, which assembled in the years 1783 and 1784. A part of the duty of this body, as marked out by the Constitution, was “to inquire whether the Constitution had been preserved inviolate in every part; and whether the legislative and executive branches of government had performed their duty as guardians of the people, or assumed to themselves, or exercised, other or greater powers than they are entitled to by the Constitution.” In the execution of this trust, the council were necessarily led to a comparison of both the legislative and executive proceedings with the constitutional powers of these departments; and from the facts enumerated, and to the truth of most of which both sides in the council subscribed, it appears that the Constitution had been flagrantly violated by the legislature in a variety of important instances.

A great number of laws had been passed violating, without any apparent necessity, the rule requiring that all bills of a public nature shall be previously printed for the consideration of the people; although this is one of the precautions chiefly relied on by the Constitution against improper acts of the legislature.

The constitutional trial by jury had been violated and powers assumed which had not been delegated by the Constitution.

Executive powers had been usurped.

The salaries of the judges, which the Constitution expressly requires to be fixed, had been occasionally varied; and cases belonging to the judiciary department, frequently drawn within legislative cognizance and determination.

Those who wish to see the several particulars falling under each of these heads may consult the journals of the council which are in print. Some of them, it will be found, may be imputable to

peculiar circumstances connected with the war; but the greater part of them may be considered as the spontaneous shoots of an ill-constituted government.

It appears, also, that the executive department had not been innocent of frequent breaches of the Constitution. There are three observations, however, which ought to be made on this head: *first*, a great proportion of the instances were either immediately produced by the necessities of the war, or recommended by Congress or the commander-in-chief; *second*, in most of the other instances they conformed either to the declared or the known sentiments of the legislative department; *third*, the executive department of Pennsylvania is distinguished from that of the other States by the number of members composing it. In this respect, it has as much affinity to a legislative assembly as to an executive council. And being at once exempt from the restraint of an individual responsibility for the acts of the body, and deriving confidence from mutual example and joint influence, unauthorized measures would, of course, be more freely hazarded, than where the executive department is administered by a single hand, or by a few hands.

The conclusion which I am warranted in drawing from these observations is that a mere demarcation on parchment of the constitutional limits of the several departments is not a sufficient guard against those encroachments which lead to a tyrannical concentration of all the powers of government in the same hands.

Document 4

Thomas Jefferson, Notes on the State of Virginia, Query 13, 120–21

1784

4. All the powers of government, legislative, executive, and judiciary, result to the legislative body [in the Virginia Constitution of 1776]. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. 173 despots would surely be as oppressive as one. Let those who doubt it turn their eyes on the republic of Venice. As little will it avail us that they are chosen by ourselves. **An elective despotism was not the government we fought for;** but one which should not only be founded on free principles, but in which the powers of government should be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others. **For this reason that convention, which passed the ordinance of government, laid its foundation on this basis, that the legislative, executive and judiciary department should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time. But no barrier was provided between these several powers. The judiciary and executive members were left dependent on the legislative, for their subsistence in office, and some of them for their continuance in it. If therefore the legislature assumes executive and judiciary powers, no opposition is likely to be made; nor, if made, can it be effectual; because in that case they may put their proceedings into the form of an act of assembly, which will render them obligatory on the other branches. They have accordingly, in many instances, decided rights which should have been left to judiciary controversy: and the direction of the executive, during the whole time of their session, is becoming habitual and familiar. And this is done with no ill intention. The views of the present members are perfectly upright. When they are led out of their regular province, it is by art in others, and inadvertence in themselves. And this will probably be the case for some time to come. But it will not be a very long time. Mankind soon learn to make interested uses of every right and power which they possess, or may assume. The public money and public liberty, intended to have been deposited with three branches of magistracy, but found inadvertently to be in the hands of one only, will soon be discovered to be sources of wealth and dominion to those who hold them; distinguished too by this tempting circumstance, that they are the instrument, as well as the object of acquisition. With money we will get men, said Caesar, and with men we will get money. Nor should our assembly be deluded by the integrity of their own purposes, and conclude that these unlimited powers will never be abused, because themselves are not disposed to abuse them. They should look forward to a time, and that not a distant one, when corruption in this, as in the country from which we derive our origin, will have seized the heads of government, and be spread by them through the body of the people; when they will purchase the voices of the people, and make them pay the price. Human nature is the same on every side of the Atlantic, and will be alike influenced by the same causes. The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.**

Activity 2 – The Debate between Publius and Brutus

The debate between Publius and Brutus shows two sides to the argument over the proposed judicial branch under the Constitution. In looking at key excerpts of the writings of these two, what are the main arguments made by both in response to judicial independence? Students will examine key excerpts from [*Federalist 78*](#) and [*Brutus XV*](#) and do a close textual analysis of the differences between the two arguments. Students will do a close textual analysis of the documents in groups or alone and fill in the chart to compare the documents.

Directions: Within the two documents, find **FIVE** arguments between Publius and Brutus and give each side of the argument in the appropriate box.

<u>Arguments</u>	<u>Publius</u>	<u>Brutus</u>
<u>Argument 1:</u>		
<u>Argument 2:</u>		
<u>Argument 3:</u>		
<u>Argument 4:</u>		
<u>Argument 5:</u>		

Discussion Questions for Activity 2

Directions: After reading the documents and comparing the arguments of Publius and Brutus in regard to judicial independence, use your knowledge from the documents to answer the following questions. Make sure to write your answers in paragraph form. Use a separate sheet of paper if necessary.

- What are the key aspects of the arguments of Publius that the judicial branch of government under the proposed Constitution will be the “least dangerous” of the three branches?
- What are the key aspects of the arguments of Brutus that the judicial branch under the Constitution will be “independent of heaven itself” and will actually be supreme to the legislative branch?

Document 5

Federalist No. 78

Publius (Alexander Hamilton)

A View of The Constitution of the Judicial Department in Relation to the Tenure of Good Behaviour

May 28, 1788

We proceed now to an examination of the judiciary department of the proposed government.

In unfolding the defects of the existing Confederation, the utility and necessity of a federal judicature have been clearly pointed out. It is the less necessary to recapitulate the considerations there urged as the propriety of the institution in the abstract is not disputed; the only questions which have been raised being relative to the manner of constituting it, and to its extent. To these points, therefore, our observations shall be confined.

The manner of constituting it seems to embrace these several objects: 1st. The mode of appointing the judges. 2nd. The tenure by which they are to hold their places. 3d. The partition of the judiciary authority between different courts and their relations to each other.

First. As to the mode of appointing the judges: this is the same with that of appointing the officers of the Union in general and has been so fully discussed in the two last numbers that nothing can be said here which would not be useless repetition.

Second. As to the tenure by which the judges are to hold their places: this chiefly concerns their duration in office; the provisions for their support, and the precautions for their responsibility.

According to the plan of the convention, all the judges who may be appointed by the United States are to hold their offices *during good behavior*; which is conformable to the most approved of the State constitutions, and among the rest, to that of this State. Its propriety having been drawn into question by the adversaries of that plan is no light symptom of the rage for objection which disorders their imaginations and judgments. The standard of good behavior for the continuance in office of the judicial magistracy is certainly one of the most valuable of the modern improvements in the practice of government. In a monarchy it is an excellent barrier to the despotism of the prince; in a republic it is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best expedient which can be devised in any government to secure a steady, upright and impartial administration of the laws.

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active

resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks. It equally proves that though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter: I mean, so long as the judiciary remains truly distinct from both the legislative and executive. For I agree that “there is no liberty if the power of judging be not separated from the legislative and executive powers.” And it proves, in the last place, that as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments; that as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation; that as, from the natural feebleness of the judiciary, it is in continual jeopardy of being overpowered, awed or influenced by its coordinate branches; and that as nothing can contribute so much to its firmness and independence as permanency in office, this quality may therefore be justly regarded as an indispensable ingredient in its constitution, and in a great measure as the citadel of the public justice and the public security.

The complete independence of the courts of justice is peculiarly essential in a limited Constitution. By a limited Constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no *ex post facto* laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

Some perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the Constitution, has arisen from an imagination that the doctrine would imply a superiority of the judiciary to the legislative power. It is urged that the authority which can declare the acts of another void must necessarily be superior to the one whose acts may be declared void. As this doctrine is of great importance in all the American constitutions, a brief discussion of the grounds on which it rests cannot be unacceptable.

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its

meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course; to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

This exercise of judicial discretion in determining between two contradictory laws is exemplified in a familiar instance. It not uncommonly happens that there are two statutes existing at one time, clashing in whole or in part with each other, and neither of them containing any repealing clause or expression. In such a case, it is the province of the courts to liquidate and fix their meaning and operation. So far as they can, by any fair construction, be reconciled to each other, reason and law conspire to dictate that this should be done; where this is impracticable, it becomes a matter of necessity to give effect to one in exclusion of the other. The rule which has obtained in the courts for determining their relative validity is that the last in order of time shall be preferred to the first. But this is mere rule of construction, not derived from any positive law but from the nature and reason of the thing. It is a rule not enjoined upon the courts by legislative provision but adopted by themselves, as consonant to truth and propriety, for the direction of their conduct as interpreters of the law. They thought it reasonable that between the interfering acts of an *equal* authority that which was the last indication of its will, should have the preference.

But in regard to the interfering acts of a superior and subordinate authority of an original and derivative power, the nature and reason of the thing indicate the converse of that rule as proper to be followed. They teach us that the prior act of a superior ought to be preferred to the subsequent act of an inferior and subordinate authority; and that, accordingly, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved any thing, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community.

Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a

competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us that the government can have no great option between fit characters; and that a temporary duration in office which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity. In the present circumstances of this country and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

Document 6

Brutus XV

Brutus

March 20, 1788

(*Continued.*)

I said in my last number, that the supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible. Certain it is, that in England, and in the several states, where we have been taught to believe, the courts of law are put upon the most prudent establishment, they are on a very different footing.

The judges in England, it is true, hold their offices during their good behaviour, but then their determinations are subject to correction by the house of lords; and their power is by no means so extensive as that of the proposed supreme court of the union. – I believe they in no instance assume the authority to set aside an act of parliament under the idea that it is inconsistent with their constitution. They consider themselves bound to decide according to the existing laws of the land, and never undertake to controul them by adjudging that they are inconsistent with the constitution – much less are they vested with the power of giving an *equitable* construction to the constitution.

The judges in England are under the controul of the legislature, for they are bound to determine according to the laws passed by them. But the judges under this constitution will controul the legislature, for the supreme court are authorised in the last resort, to determine what is the extent of the powers of the Congress; they are to give the constitution an explanation, and there is no power above them to set aside their judgment. The framers of this constitution appear to have followed that of the British, in rendering the judges independent, by granting them their offices during good behaviour, without following the constitution of England, in instituting a tribunal in which their errors may be corrected; and without adverting to this, that the judicial under this system have a power which is above the legislative, and which indeed transcends any power before given to a judicial by any free government under heaven.

I do not object to the judges holding their commissions during good behaviour. I suppose it a proper provision provided they were made properly responsible. But I say, this system has followed the English government in this, while it has departed from almost every other principle of their jurisprudence, under the idea, of rendering the judges independent; which, in the British constitution, means no more than that they hold their places during good behaviour, and have fixed salaries, they have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent

of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself. Before I proceed to illustrate the truth of these assertions, I beg liberty to make one remark – Though in my opinion the judges ought to hold their offices during good behaviour, yet I think it is clear, that the reasons in favour of this establishment of the judges in England, do by no means apply to this country.

The great reason assigned, why the judges in Britain ought to be commissioned during good behaviour, is this, that they may be placed in a situation, not to be influenced by the crown, to give such decisions, as would tend to increase its powers and prerogatives. While the judges held their places at the will and pleasure of the king, on whom they depended not only for their offices, but also for their salaries, they were subject to every undue influence. If the crown wished to carry a favorite point, to accomplish which the aid of the courts of law was necessary, the pleasure of the king would be signified to the judges. And it required the spirit of a martyr, for the judges to determine contrary to the king's will. – They were absolutely dependent upon him both for their offices and livings. The king, holding his office during life, and transmitting it to his posterity as an inheritance, has much stronger inducements to increase the prerogatives of his office than those who hold their offices for stated periods, or even for life. Hence the English nation gained a great point, in favour of liberty. When they obtained the appointment of the judges, during good behaviour, they got from the crown a concession, which deprived it of one of the most powerful engines with which it might enlarge the boundaries of the royal prerogative and encroach on the liberties of the people. But these reasons do not apply to this country, we have no hereditary monarch; those who appoint the judges do not hold their offices for life, nor do they descend to their children. The same arguments, therefore, which will conclude in favor of the tenor of the judge's offices for good behaviour, lose a considerable part of their weight when applied to the state and condition of America. But much less can it be shewn, that the nature of our government requires that the courts should be placed beyond all account more independent, so much so as to be above controul.

I have said that the judges under this system will be *independent* in the strict sense of the word: To prove this I will shew – That there is no power above them that can controul their decisions, or correct their errors. There is no authority that can remove them from office for any errors or want of capacity, or lower their salaries, and in many cases their power is superior to that of the legislature.

1st. There is no power above them that can correct their errors or controul their decisions – The adjudications of this court are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits. – In this respect it differs from the courts in England, for there the house of lords is the highest court, to whom appeals, in error, are carried from the highest of the courts of law.

2d. They cannot be removed from office or suffer a dimunition of their salaries, for any error in judgement or want of capacity.

It is expressly declared by the constitution, – “That they shall at stated times receive a compensation for their services which shall not be diminished during their continuance in office.”

The only clause in the constitution which provides for the removal of the judges from office, is that which declares, that “the president, vice-president, and all civil officers of the United States, shall be removed from office, on impeachment for, and conviction of treason, bribery, or other high crimes and misdemeanors.” By this paragraph, civil officers, in which the judges are included, are removable only for crimes. Treason and bribery are named, and the rest are included under the general terms of high crimes and misdemeanors. – Errors in judgement, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, *high crimes and misdemeanors*. A man may mistake a case in giving judgment, or manifest that he is incompetent to the discharge of the duties of a judge, and yet give no evidence of corruption or want of integrity. To support the charge, it will be necessary to give in evidence some facts that will shew, that the judges committed the error from wicked and corrupt motives.

3d. The power of this court is in many cases superior to that of the legislature. I have shewed, in a former paper, that this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power. The legislature can only exercise such powers as are given them by the constitution, they cannot assume any of the rights annexed to the judicial, for this plain reason, that the same authority which vested the legislature with their powers, vested the judicial with theirs – both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the legislature, as the legislature do of the judicial. – The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgement of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme – and no law, explanatory of the constitution, will be binding on them.

From the preceding remarks, which have been made on the judicial powers proposed in this system, the policy of it may be fully developed.

I have, in the course of my observation on this constitution, affirmed and endeavored to shew, that it was calculated to abolish entirely the state governments, and to melt down the states into one entire government, for every purpose as well internal and local, as external and national. In this opinion the opposers of the system have generally agreed – and this has been uniformly

denied by its advocates in public. Some individuals, indeed, among them, will confess, that it has this tendency, and scruple not to say, it is what they wish; and I will venture to predict, without the spirit of prophecy, that if it is adopted without amendments, or some such precautions as will ensure amendments immediately after its adoption, that the same gentlemen who have employed their talents and abilities with such success to influence the public mind to adopt this plan, will employ the same to persuade the people, that it will be for their good to abolish the state governments as useless and burdensome.

Perhaps nothing could have been better conceived to facilitate the abolition of the state governments than the constitution of the judicial. They will be able to extend the limits of the general government gradually, and by insensible degrees, and to accomodate themselves to the temper of the people. Their decisions on the meaning of the constitution will commonly take place in cases which arise between individuals, with which the public will not be generally acquainted; one adjudication will form a precedent to the next, and this to a following one. These cases will immediately affect individuals only; so that a series of determinations will probably take place before even the people will be informed of them. In the mean time all the art and address of those who wish for the change will be employed to make converts to their opinion. The people will be told, that their state officers, and state legislatures are a burden and expence without affording any solid advantage, for that all the laws passed by them, might be equally well made by the general legislature. If to those who will be interested in the change, be added, those who will be under their influence, and such who will submit to almost any change of government, which they can be persuaded to believe will ease them of taxes, it is easy to see, the party who will favor the abolition of the state governments would be far from being inconsiderable. – In this situation, the general legislature, might pass one law after another, extending the general and abridging the state jurisdictions, and to sanction their proceedings would have a course of decisions of the judicial to whom the constitution has committed the power of explaining the constitution. – If the states remonstrated, the constitutional mode of deciding upon the validity of the law, is with the supreme court, and neither people, nor state legislatures, nor the general legislature can remove them or reverse their decrees.

Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right; and indeed I can see no other remedy that the people can have against their rulers for encroachments of this nature. A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm*.

Activity 3 – Interpretation of Article III of the Constitution

The debates between Publius and Brutus define some specific arguments when it comes to the interpretation of the powers given to the judicial branch under [Article III](#). What specific arguments does each writer make in regard to the actual words of [Article III of the Constitution](#)? Students will again examine the writings of Brutus and Publius and do a close textual analysis of the differing views of key parts of Article III. Students may need to look at [Federalist 79-83](#) and [Brutus XI-XIV and XVI](#). Start with the previous document of [Federalist 78](#) (Document 5) and [Brutus XV](#) (Document 6). Students will do a close textual analysis of the documents in groups or alone and fill in the chart to compare the documents.

<u>Article III</u>	<u>Publius</u>	<u>Brutus</u>
<u>Section 1</u> Judicial Powers Tenure Compensation		
<u>Section 2</u> Judicial Powers; to what cases it extends Original Jurisdiction Appellate Jurisdiction Trials; by jury and where		
<u>Section 3</u> Treason; Proof and Punishment		

ARTICLE III OF THE CONSTITUTION

Section 1- Judicial powers. Tenure. Compensation.

The judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may, from time to time, ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Section 2 - Judicial power; to what cases it extends. Original jurisdiction of Supreme Court Appellate. Trial by Jury, etc. Trial, where

1. The judicial power shall extend to all cases, in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states, between a state and Citizens of another state, between Citizens of different states, between Citizens of the same state, claiming lands under grants of different states, and between a state, or the Citizens thereof, and foreign states, Citizens or subjects. (This section modified by [Amendment XI](#))

2. In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before-mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

3. The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Section 3 - Treason defined. Proof of. Punishment of.

1. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

2. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted

Discussion Questions for Activity 3

Directions: After reading the documents and comparing the arguments of Publius and Brutus in regard to [Article III of the Constitution](#), use your knowledge from the documents to answer the following questions. Make sure to write your answers in paragraph form. Use a separate sheet of paper if necessary.

- What checks are given specifically to the other branches in Article III in regard to the power and function of the judicial branch?

- Both men claim that the judicial branch will have the power of “judicial review.” What specific part of Article III infers this power, if any?

Assessments for Lesson 1

Assessment 1 - The students will read [*Federalist 78*](#) (Document 5) and [*Brutus XV*](#) (Document 6) and compare the arguments made by the two writers and compose the following argumentative essay:

- Write an argumentative essay deciding which writer makes the best case for the scope of judicial independence under the proposed Constitution of the United States. Was Brutus right in his assumption that the judicial branch would be “independent of heaven itself” and will be the most supreme of the three branches or was Publius right in stating that the judiciary would “have neither force nor will” and would therefore be the “least dangerous” of the three branches? Make sure to use quotes and examples from the writings to support your side and refute the other side. The assessment rubric is included.

Assessment 2 - The students will read [Article III of the Constitution](#) (Document 7) and answer the following questions:

- What powers are given to the Supreme Court in Article III of the Constitution?
- Does Article III establish any limitations on the Court's power? If yes, what are they?
- What does Publius mean when he says the legislative branch has the power of the "purse" and the executive branch has the power of the "sword"? How does this relate to judicial powers under Article III?
- What, if any, are other powers given to the other branches over the judicial branch in Article III of the Constitution?

Rubric for Assessment 1

Persuasive Essay Rubric: Common Core for Reading and Writing Standards

Based on Common Core Standards for Reading/Writing in History/Social Sciences (www.corestandards.org)

Note: Students must MEET or EXCEED standard on the asterisked indicators in order to meet standard on the essay

	Exceeds Standard (A)	Meets Standard (B)	Almost to Standard MUST REWRITE	Below
Standard=no R/W				
Thesis/Claim	<input type="checkbox"/> Thesis/Claim is precise, knowledgeable, significant, and distinguished from alternate or opposing claims	<input type="checkbox"/> Thesis/Claim is precise and knowledgeable, and answers the prompt (W1)	<input type="checkbox"/> Thesis/Claim may be unclear or irrelevant, and/or may not answer prompt	<input type="checkbox"/> Thesis/Claim is missing
*Use of Evidence	<input type="checkbox"/> Develops the topic thoroughly by selecting the most significant and relevant facts, concrete details, quotations, or other information and examples from the text(s) <input type="checkbox"/> Skillfully integrates information into the text selectively to maintain the flow of ideas and advance the thesis <input type="checkbox"/> Skillfully assesses the strengths and limitations of each source	<input type="checkbox"/> Develops the topic by selecting significant and relevant facts, concrete details, quotations, or other information and examples from the text(s) (W2) <input type="checkbox"/> Integrates information into the text selectively to maintain the flow of ideas and advance the thesis (W8) <input type="checkbox"/> Assesses the strengths and limitations of each source (W8)	<input type="checkbox"/> Attempts to develop the topic using facts and other information, but evidence is inaccurate, irrelevant, and/or insufficient <input type="checkbox"/> Attempts to integrate information into the text selectively to maintain the flow of ideas and advance the thesis, but information is insufficient or irrelevant <input type="checkbox"/> Attempts to assess the strengths and limitations of each source, but misinterprets information	<input type="checkbox"/> Does not develop the topic by selecting information and examples from the text(s) <input type="checkbox"/> Does not integrate information from the text <input type="checkbox"/> Does not assess the strengths and limitations of each source
*Use of Analysis	<input type="checkbox"/> Skillfully draws evidence from informational texts to support analysis and thesis/claim <input type="checkbox"/> Skillfully delineates and evaluates the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient <input type="checkbox"/> Skillfully identifies false statements and fallacious reasoning	<input type="checkbox"/> Draws evidence from informational texts to support analysis and thesis/claim (W9) <input type="checkbox"/> Delineates and evaluates the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient (R8) <input type="checkbox"/> Identifies false statements and fallacious reasoning (R8)	<input type="checkbox"/> Attempts to draw evidence from informational texts to support analysis and thesis/claim but evidence is insufficient and/or irrelevant <input type="checkbox"/> Attempts to delineate and evaluate the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient, but analysis is insufficient <input type="checkbox"/> Attempts to identify false statements and fallacious reasoning, but argument is incomplete or insufficient	<input type="checkbox"/> Does not use evidence from the informational texts to support analysis and/or thesis/claim <input type="checkbox"/> Does not delineate or evaluate claims in text <input type="checkbox"/> Does not identify false claims or fallacious reasoning
*Organization, Writing Style and Conventions	<input type="checkbox"/> Organization skillfully sequences the claim(s), counterclaims, reasons, and evidence. <input type="checkbox"/> Provides a concluding statement or section that skillfully follows from or supports the argument presented <input type="checkbox"/> Skillfully produces clear, coherent, sophisticated writing in which the development, organization, and style are appropriate to task, purpose, and audience	<input type="checkbox"/> Organization logically sequences the claim(s), counterclaims , reasons, and evidence. (W1) <input type="checkbox"/> Provides a concluding statement or section that follows from or supports the argument presented (W1) <input type="checkbox"/> Produces clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience (W4)	<input type="checkbox"/> Attempts to create a logical organization, but may be missing some elements of the assignment, such as a counterclaim <input type="checkbox"/> Attempts to provide a concluding statement or section that follows from or supports the argument presented, but statement does not support thesis <input type="checkbox"/> Attempts to produce clear and coherent writing, but errors in conventions and writing style detract from understanding	<input type="checkbox"/> Does not provide logical organization <input type="checkbox"/> Does not provide a concluding statement or section that follows from or supports the argument presented <input type="checkbox"/> Does not produce clear and coherent writing

Score for this draft: _____

Teacher notes and additional comments:

Publius vs. Brutus and the Debate over the “Least Dangerous” Branch

Lesson 2 – *Marbury v. Madison*: Establishing the Legitimacy of the Judicial Branch of Government

Introduction

"It is emphatically the province and duty of the judicial department to say what the law is."

- Chief Justice John Marshall, in [*Marbury v. Madison*](#), 1803

The Supreme Court case, [*Marbury v. Madison \(1803\)*](#), is perhaps the most significant opinion in the history of the judicial branch of government. This case exercised for the first time what is known as the power of judicial review -- the ability of the Court to uphold or deny the constitutionality of congressional or executive actions.

In delivering the opinion of the Supreme Court, Chief Justice John Marshall, did not invent judicial review. As can be seen from the debates of the Federalists and Antifederalists, the Framers of the Constitution were well aware of this power and believed it was the “peculiar province of the courts” to exercise it. The controversial nature of this power, however, has drawn both criticism and praise over the course of history.

This lesson will focus on the case of [*Marbury v. Madison*](#) and Chief Justice Marshall’s application of the power of judicial review. The controversial history of this power has deep roots in the contentious political history of the aftermath of the [Presidential Election of 1800](#). The political temperament of the period put the Supreme Court in a precarious position as it faced an imminent and dangerous threat to its independence and power from the Jeffersonians. By examining the controversy surrounding this Supreme Court decision, students will gain a better understanding of the tenuous position of the Court and the historical significance of Chief Justice John Marshall’s decision,

Guided Questions

- Why was the power of judicial review, explained in John Marshall’s decision in *Marbury v. Madison*, important to the future of the Supreme Court as a co-equal branch of government?
- What was the prevalent history of judicial review as it pertained to the Founding period?
- What does the political context of this case illustrate about the nature of the Judiciary?

Learning Objectives

After this lesson students will be able to:

- Explain the role of the Supreme Court in interpreting the Constitution of the United States.

- Explain the importance of judicial review and the significance of [*Marbury v. Madison*](#) and the roles each has played in the future history of the Supreme Court.
- Understand the history of the concept of judicial review and its origins in the Founding era.
- Compare the arguments on the power of judicial review, which both Publius and Brutus believe is given to the courts by the Constitution.

Background

For background information on the powers of the federal judiciary, teachers should examine the EDSITEment website [The Supreme Court: The Judicial Power of the United States](#); a series of lessons and background information about how the judiciary system was created and functions.

Many historians believe that Chief Justice John Marshall invented judicial review [in *Marbury v. Madison*](#) thus making the judiciary the sole interpreter of the Constitution. Others believe that Marshall merely reinforced the original understanding of the court's role in our constitutional system. The difficulty with any assessment of the decision is that a thorough understanding of the significance requires some knowledge of the context. It cannot be denied that the judicial branch was in a tenuous position in 1803, and Marshall was able to turn around the constitutional disposition of the Court with his decision in [Marbury v. Madison](#).

The facts surrounding the case were complicated by the reality of it being decided amidst serious political turmoil that directly affected the judiciary. President John Adams and his Federalist Party had been defeated in the [elections of 1800](#) by Thomas Jefferson and his newly formed Democratic-Republican Party. Jefferson had won the Presidency and his party also gained control of Congress.

At this time in history, the lame-duck period lasted between the November elections and the inauguration of the new President on March 4, 1801. During this time, the Federalists and John Adams still controlled the government and they were able to pass the [Judiciary Act of 1801](#) and additional legislation concerning the judicial system of the District of Columbia. A key provision of the Judiciary Act created sixteen new federal circuit judgeships that would relieve Supreme Court judges of the responsibility of "riding circuit." The District of Columbia legislation would create an opportunity for the President to appoint forty-two justices of the peace to five-year terms.

Jefferson and the Democratic-Republicans were furious when Adams appointed all of these judges, who were labelled the "Midnight Judges", in the last days of his presidency. The lame-duck, Federalist controlled Senate was quick to confirm all of the judges and the commissions, a document authorizing someone to take office, were signed, sealed and ready for delivery. William Marbury was one of the people appointed and confirmed as justice of the peace in the District of Columbia. John Marshall, who was Secretary of State at the time and had also been nominated as Chief Justice of the Supreme Court, was in charge of delivering the commissions to the judges. A handful of the commissions were not delivered by the time Adams left office and one of them happened to be Marbury's.

When Jefferson took office, he ordered his Secretary of State, James Madison, not to deliver the commissions that were left by the previous administration. Marbury petitioned the Supreme Court for a writ of mandamus, or legal order, compelling Madison to show cause as to why the commission should not be delivered. The political gauntlet had been dropped by the Federalist controlled judiciary and the Democratic-Republican controlled Congress and President Jefferson were prepared to respond.

The Congress first repealed the [Judiciary Act of 1801](#) and eliminated all sixteen federal judgeships that had been created. This was the first swipe at reducing judicial independence and the power of the judiciary. Then they passed the [Judiciary Act of 1802](#), which among other provisions established one annual Supreme Court term beginning on the first Monday in February. This wiped out both Supreme Court terms scheduled in 1802 and basically took the Court out of action for more than a year, thus delaying arguments on Marbury's case. During this period, the Jeffersonians took another swipe at the judiciary when the House of Representatives began impeachment hearings against a federal judge in New Hampshire.

Faced with a political quandary, the Supreme Court was in a bind with the pending Marbury case. On one side, they encountered a President and administration that had declared judicial appointments invalid, and that would likely refuse to recognize any court order compelling delivery of Marbury's commission. On the other side was a Congress that had eliminated federal judges with legislation and was prepared to use impeachment to control a Federalist-dominated judiciary. Consequently, the decision in [Marbury v. Madison](#) carried a weight of significance that could resonate on the future of an independent judicial branch.

The legal case itself presented three questions. First, did Marbury actually have a right to *the writ of mandamus* for which he petitioned? Second, did the laws of the United States give the courts the power to grant Marbury such a writ? Third, if they did allow this, could the Supreme Court issue such a writ? In regard to the first question, Marshall ruled that Marbury had been properly nominated according to the proper procedures prescribed by law and therefore had a right to the commission. Secondly, the [Judiciary Act of 1789](#) afforded Marbury a legal means of securing that commission – a writ of mandamus issued by the Supreme Court under its original jurisdiction. So far, so good.

The third question, however, proved more problematic for Marbury in Marshall's decision. Here Marshall asked whether the Supreme Court in its original jurisdiction has the power to issue the writ. Marshall answered "no." [Section 13 of the Judiciary Act of 1789](#), had exceeded the legislature's law-making authority by granting the court, contrary to *Article III Section 2*, the authority to hear cases under its original jurisdiction. Congress, according to Marshall, cannot alter the explicit terms of the Court's original Jurisdiction in *Article III, Section 2*.

In answering the third question, Marshall managed to confound his opponents through adept maneuvering and limit the Court's power on one hand and assert a much more important power for the Court – the power of judicial review. While Marshall had to concede that his fellow Federalist, William Marbury, would not be elevated to the position for which he had been nominated by John Adams, the decision did allow the court to assert a power that could be wielded against the Jeffersonians in both the legislature and the executive. Furthermore,

Marshall would not have to endure the embarrassment of issuing an order to the Secretary of State that the Jeffersonian administration would likely ignore.

The saviness of the decision also allowed Marshall to assert the high ground for the court in its domain of power. The Constitution, Marshall declared, was the product of the people's sovereignty and they had the right to establish the principles of their own government. The court had the important democratic duty of upholding the will of the people against temporary majorities. With this he declared that "it is emphatically the province... of the judicial department to say what the law is;" thus it is the courts that decide which law governs between two conflicting laws. And because the Constitution is superior to any ordinary legislative act, "the Constitution, and not the ordinary act, must govern the case to which they both apply."

Marshall's assertion was not one of judicial supremacy where the court was the only interpreter of the Constitution. On the contrary, he was careful to acknowledge that both the legislative and executive branches had the right to interpret the Constitution within their own spheres of power. Marshall and the Court would affirm this in subsequent decisions where they showed a willingness to give broad deference to the other branches ability to interpret the Constitution within their own powers. In fact, in Chief Justice Marshall's long and storied career on the bench of more than thirty years, the Supreme Court would not strike down another act of Congress.

In concluding that the Court has the ability "to say what the law is" within the limitations of a written constitution, Chief Justice Marshall believed he was conforming to what the Framers agreed to at the Constitutional Convention. It was at the Convention where the idea of the right of the Court to review act of the legislature was discussed and understood to be the province of judges and the judiciary. It was during the Ratification debates between Publius and Brutus that the function and scope of this power was questioned and contested.

In the Ratification debates, Brutus argued that the language of "equity" included in [Article III](#) of the proposed Constitution would not only establish judicial review, but would invite the courts to look at the "spirit of the law" which would lead to judicial supremacy over the other branches. Publius responded in [Federalist 78](#) by defending judicial review and denying judicial supremacy. He stated that the Constitution required the judiciary to declare acts of the legislature "void" if they violated the "manifest tenor" of the fundamental law. He also claimed that individual judges would never substitute will for judgment because they did not possess the power of the "sword" or "purse", therefore, they were the "least dangerous" of the three branches. Even John Marshall himself made a similar claim of this power belonging to the judicial branch in a speech at the Virginia Ratifying Convention. Thomas Jefferson also accepted judicial review as long as judges exercised restraint in its administration.

The Founders discussion of the powers of the judiciary in regard to judicial review illustrates that the concept had been defined, and most agreed that the power existed within limits. Chief Justice John Marshall did not invent judicial review in [Marbury v. Madison](#) and he did not suggest a sense of judicial supremacy in the interpretation of the Constitution as has been suggested and even carried out in more recent Supreme Court decisions. What he did do was

establish an independent judicial branch with co-equal status within a government based on the rule of law and a written constitution.

Preparation Instructions

Review each lesson plan. Locate and bookmark suggested materials and links from the websites. Download and print out selected documents and duplicate copies as necessary for student viewing. Alternatively, excerpted versions of these documents are available at the end of these lessons along with questions and activities for each lesson.

Teachers will need to read the background and the documents to fully understand the concepts involved in the lesson. Students will be asked to read the documents as part of the activities involved in the lesson and will get a better understanding of [*Marbury v. Madison*](#) and how the Supreme Court was able to establish itself as a co-equal branch by invoking the power of judicial review.

Analyzing Primary Sources

If your students lack experience in dealing with primary sources, you might use one or more preliminary exercises to help them develop these skills. [The Learning Page](#) at the [American Memory Project of the Library of Congress](#) includes a set of such activities. Another useful resource is the [Digital Classroom of the National Archives](#), which features a set of [Document Analysis Worksheets](#). Finally, [History Matters](#) offers pages on ["Making Sense of Maps"](#) and ["Making Sense of Oral History"](#) which give helpful advice to teachers in getting their students to use such sources effectively.

Lesson Activities

Activity 1 – Debate on the Function of the Judiciary from the [Constitutional Convention](#)

From May to September of 1787, fifty-five delegates from the states met in the State House in Philadelphia to debate the terms of a new Constitution. Delegates spent a brief time debating the function of the judicial branch, but the time was important to the vision the Framers had of the third branch of government. In looking at the actual debates, what was the final consideration on the function and scope of the judiciary? Students will examine the debates and do a close textual analysis individually or in group and will fill out a chart about some of the key founders and their views on the judicial branch.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What was the purpose of the idea of a Council of Revision? Who would make up this Council and what would be their role under the new Constitution?

- What evidence in the debates shows that the Framers recognized what we today call judicial review? How should the exercise of judicial review take place according to the debates?

Activity 2 – The Opinion of Chief Justice John Marshall

In delivering the opinion for the majority of the Supreme Court, Chief Justice John Marshall helped to establish the judiciary as a viable branch of government under the Constitution by giving up some power in order to get more – the power of judicial review. What were the key parts of the decision and how did the decision help solidify the power and function of the Supreme Court? Students will analyze key excerpts of the opinion in [*Marbury v. Madison*](#) and through close textual analysis answer key questions for discussion. These answers will be used to write a persuasive essay on the power of judicial review.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What were the reasons for Chief Justice John Marshall using the idea of judicial review to make the case in [*Marbury v. Madison*](#)?
- What power did the Court give up in this case and what power did they gain? Why is this significant to the status and power of the Supreme Court with the three branch system?

Activity 3 – Important Documents: Document Based Questions on Judicial Review

The Founding period provides many diverse and interesting opinions about the power of judicial review. These opinions provide a range of differing attitudes about the power and who should be entitled to it under the Constitution. What are some of these differences of opinions and how did they ultimately influence the power of the Courts? Students will evaluate various excerpts from the Founding on the power of judicial review and will answer the scaffolding questions about each document. Using the information from the documents, they will answer the key question in an organized essay which will include interpretations of the documents.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- Who do some of the authors of the documents believe should have the power of judicial review? Who should have this power according to the Constitution?
- Does the Supremacy Clause of the [*Article VI*](#) validate the power of judicial review given to the Courts? If the Founders wanted the Courts to have this power, why didn't they specifically put the words in the Constitution?

Assessment

Teachers should have students do the first assessment below to examine student understanding of the power of judicial review. The first assessment can be a culminating writing activity for both Activity 2 and 3 of this lesson. The second assessment may be used as an extra assessment or as an alternative assessment for students with lesser abilities or reading level.

Assessment 1 – The students will read the opinion of Chief Justice John Marshall on [*Marbury v. Madison*](#), [*Federalist 78*](#), and [*Brutus XV*](#) along with the other documents in Activity 3 and compare all arguments involved in the power of judicial review. They will then compose a persuasive essay on the following:

- Using all the documents for review, write a persuasive essay arguing whether or not the Supreme Court of the United States should have the power to overturn acts of the legislative branch or executive branch that they deem to be unconstitutional. Make sure to use quotes and examples from the documents to support your position. The assessment rubric is included.

Assessment 2 - The students will read the opinion of Chief Justice John Marshall on [*Marbury v. Madison*](#), [*Federalist 78*](#), and [*Brutus XV*](#) along with the other documents in Activity 3 and compare all arguments involved in the power of judicial review. Using all the information from the documents and answer the questions about the following scenario. Make sure to use quotes and examples from the documents to support your position.

- **Constitutional Scenario** – The Congress of the United States has heard complaints about the lack of knowledge voters have about elections and they believe it is compromising the results of important races and government issues in federal elections. In order to try and solve this problem, Congress passes a law requiring all eligible voters to take a “competency and knowledge test” prior to voting in an election. The voter must pass the test with at least 90% accuracy in order to cast a ballot and vote. The President signs the law and says he will make sure the proper administration of the test takes place at all polling locations. He will also have use armed military personnel at each polling location to enforce compliance with the law and make sure there are no disruptions of the election process.
 - Can anything be done to in this situation to safeguard the people and their constitutional rights? If so, what?
 - Without the “sword” or the “purse,” what can the Supreme Court do if the other two branches refuse to abide by their decision that this law is unconstitutional?
 - Does the fact that the Court has the power to review actions of the other two branches relieve these two branches of their obligation to uphold their Constitutional duties?
 - Is it possible for the United States to have a functioning and working government without the power of judicial review? How could a system without this power be organized and still protect the fundamental law of the Constitution?

Extending the Lesson

Students should be encouraged to research other Supreme Court cases where the power of judicial review was used to rule acts of the other two branches or state laws unconstitutional. With this research students could produce their own Document Based Questions based on at least three other court cases they find.

Students could also use the documents in this lesson and make a video presentation or poster explaining the concept of judicial review within our Constitution. Examples could include a recreation of the Constitutional Convention or the case of [*Marbury v. Madison*](#) or biographical posters of the key players at the Convention or the Supreme Court case.

Selected Websites and Documents

Teaching American History

- [*Marbury v. Madison*](#)
- [*Federalist 78*](#)
- [*Federalist 81*](#)
- [*Brutus XII*](#)
- [*Brutus XV*](#)
- [The Constitution of the United States](#)
- [Debates on the Constitutional Convention](#)

Founders Constitution

- [Thomas Jefferson to Spencer Roane, 1819](#)

Federal Judicial Center

- [Judiciary Act of 1789](#)
- [Judiciary Act of 1801](#)
- [Judiciary Act of 1802](#)

Library of Congress

- [Election of 1800](#)

The Basics

Grade Level

- 9-12

Time Required

- 3 to 5 class periods

Subject Areas

- History, Social Studies
 - U.S. Constitution
 - U.S. History
 - Government
 - Political Science
 - AP U.S. History, Government

Skills

- Critical analysis

- Critical thinking
- Discussion
- Evaluating arguments
- Gathering, classifying and interpreting written, oral and visual information
- Historical analysis
- Interpretation
- Making inferences and drawing conclusions
- Using primary sources

Lesson Resources

- Text documents (attached on the following pages)
- Student Activities (attached on the following pages)
- Assessments (attached on the following pages)

Activity 1 – Debate on the Function of the Judiciary from the [Constitutional Convention](#)

From May to September of 1787, fifty-five delegates from the states met in the State House in Philadelphia to debate the terms of a new Constitution. Delegates spent a brief time debating the function of the judicial branch, but the time was important to the vision the Framers had of the third branch of government. In looking at the actual debates, what was the final consideration on the function and scope of the judiciary? Students will examine the debates and do a close textual analysis of them individually or in group and will fill out a chart about some of the key founders and their views on the judicial branch power.

Directions: Read the excerpts from the [Constitutional Convention](#) that follow and use them to fill in the chart below.

<u>Framers</u>	<u>Judicial Branch View</u>
Mr. Gerry	
Mr. King	
Mr. Wilson	
Mr. Ghorum	
Mr. Ellsworth	

<u>Mr. Madison</u>	
<u>Col. Mason</u>	
<u>Mr. Strong</u>	
<u>Mr. Govr. Morris</u>	
<u>Mr. L. Martin</u>	
<u>Mr. Rutledge</u>	
<u>Mr. Pinckney</u>	
<u>Mr. Randolph</u>	

Discussion Questions for Activity 1

Directions: After reading the debates from the [Constitutional Convention](#) use your knowledge to answer the discussion questions below. This may be done individually or in groups. Make sure to write your answers in paragraph form on a separate sheet of paper if needed.

- What were the reasons for Chief Justice John Marshall using the idea of judicial review to make the case in [Marbury v. Madison](#)?
- What power did the Court give up in this case and what power did they gain? Why is this significant to the status and power of the Supreme Court with the three branch system?

Debate from the Constitutional Convention regarding the function of the judiciary (Madison's Notes)

June 4, 1787 – IN COMMITTEE OF THE WHOLE

First Clause of Proposition 8th.⁶ relating to a Council of Revision taken into consideration.

Mr. GERRY doubts whether the Judiciary ought to form a part of it, as they will have a sufficient check agst. encroachments on their own department by their exposition of the laws, which involved a power of deciding on their Constitutionality. In some States the Judges had actually set aside laws as being agst. the Constitution. This was done too with general approbation. It was quite foreign from the nature of ye. office to make them judges of the policy of public measures. He moves to postpone the clause in order to propose “that the National Executive shall have a right to negative any Legislative act which shall not be afterwards passed by —— parts of each branch of the national Legislature.”

Mr. KING seconds the motion, observing that the Judges ought to be able to expound the law as it should come before them, free from the bias of having participated in its formation.

Mr. WILSON thinks neither the original proposition nor the amendment go far enough. If the Legislative Exetv & Judiciary ought to be distinct & independent. The Executive ought to have an absolute negative. Without such a self-defense the Legislature can at any moment sink it into non-existence. He was for varying the proposition in such a manner as to give the Executive & Judiciary jointly an absolute negative.

On the question to postpone in order to take Mr. Gerry's proposition into consideration it was agreed to, Masss. ay. Cont. no. N. Y. ay. Pa. ay. Del. no. Maryd. no. Virga. no. N. C. ay. S. C. ay. Ga. ay.⁷

July 21, 1787 – IN CONVENTION

Mr. WILSON moved as an amendment to Resoln. 10.¹ that the supreme Natl. Judiciary should be associated with the Executive in the Revisionary power.” This proposition had been before made and failed: but he was so confirmed by reflection in the opinion of its utility, that he thought it incumbent on him to make another effort: The Judiciary ought to have an opportunity of remonstrating agst. projected encroachments on the people as well as on themselves. It had been said that the Judges, as expositors of the Laws would have an opportunity of defending their constitutional rights. There was weight in this observation; but this power of the Judges did not go far enough. Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet may not be so unconstitutional as to justify the Judges in refusing to give them effect. Let them have a share in the Revisionary power, and they will have an opportunity of taking notice of these² characters of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.-

Mr. MADISON ²ded. the motion

Mr. GHORUM did not see the advantage of employing the Judges in this way. As Judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures. Nor can it be necessary as a security for their constitutional rights. The Judges in England have no such additional provision for their defence, yet their jurisdiction is not invaded. He thought it would be best to let the Executive alone be responsible, and at most to authorize him to call on³ Judges for their opinions.

Mr. ELSEWORTH approved heartily of the motion. The aid of the Judges will give more wisdom & firmness to the Executive. They will possess a systematic and accurate knowledge of the Laws, which the Executive can not be expected always to possess. The law of Nations also will frequently come into question. Of this the Judges alone will have competent information.

Mr. MADISON considered the object of the motion as of great importance to the meditated Constitution. It would be useful to the Judiciary department, by giving it an additional opportunity of defending itself against Legislative encroachments; It would be useful to the Executive, by inspiring additional confidence & firmness in exerting the revisionary power: It would be useful to the Legislature by the valuable assistance it would give in preserving a consistency, conciseness, perspicuity & technical propriety in the laws, qualities peculiarly necessary; & yet shamefully wanting in our republican Codes. It would moreover be useful to the Community at large as an additional check against a pursuit of those unwise & unjust measures which constituted so great a portion of our calamities. If any solid objection could be urged against the motion, it must be on the supposition that it tended to give too much strength either to the Executive or Judiciary. He did not think there was the least ground for this apprehension. It was much more to be apprehended that notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions; & suggested the necessity of giving every defensive authority to the other departments that was consistent with republican principles.

Mr. MASON said he had always been a friend to this provision. It would give a confidence to the Executive, which he would not otherwise have, and without which the Revisionary power would be of little avail.

Mr. GERRY did not expect to see this point which had undergone full discussion, again revived. The object he conceived of the Revisionary power was merely to secure the Executive department against legislative encroachment. The Executive therefore who will best know and be ready to defend his rights ought alone to have the defence of them. The motion was liable to strong objections. It was combining & mixing together the Legislative & the other departments. It was establishing an improper coalition between the Executive & Judiciary departments. It was making Statesmen of the Judges; and setting them up as the guardians of the Rights of the people. He relied for his part on the Representatives of the people as the guardians of their Rights & interests. It was making the Expositors of the Laws, the Legislators which ought never to be done. A better expedient for correcting the laws, would be to appoint as had been done in Pennsylvania a person or persons of proper skill, to draw bills for the Legislature.

Mr. STRONG thought with Mr. Gerry that the power of making ought to be kept distinct from that of expounding, the laws. No maxim was better established. The Judges in exercising the function of expositors might be influenced by the party they had taken, in framing the laws.

Mr. Govr. MORRIS. Some check being necessary on the Legislature, the question is in what hands it should be lodged. On one side it was contended that the Executive alone ought to exercise it. He did not think that an Executive appointed for 6 years, and impeachable whilst in office would be a very effectual check. On the other side it was urged that he ought to be reinforced by the Judiciary department. Against this it was objected that Expositors of laws ought to have no hand in making them, and arguments in favor of this had been drawn from England. What weight was due to them might be easily determined by an attention to facts. The truth was that the Judges in England had a great share in ye. Legislation. They are consulted in difficult & doubtful cases. They may be & some of them are members of the Legislature. They are or may be members of the privy Council, and can there advise the Executive as they will do with us if the motion succeeds. The influence the English Judges may have in the latter capacity in strengthening the Executive check can not be ascertained, as the King by his influence in a manner dictates the laws. There is one difference in the two Cases however which disconcerts all reasoning from the British to our proposed Constitution. The British Executive has so great an interest in his prerogatives and such powerful means of defending them that he will never yield any part of them. The interest of our Executive is so inconsiderable & so transitory, and his means of defending it so feeble, that there is the justest ground to fear his want of firmness in resisting encroachments. He was extremely apprehensive that the auxiliary firmness & weight of the Judiciary would not supply the deficiency. He concurred in thinking the public liberty in greater danger from Legislative usurpations than from any other source. It had been said that the Legislature ought to be relied on as the proper Guardians of liberty. The answer was short and conclusive. Either bad laws will be pushed or not. On the latter supposition no check will be wanted. On the former a strong check will be necessary: And this is the proper supposition. Emissions of paper money, largesses to the people-a remission of debts and similar measures, will at some times be popular, and will be pushed for that reason At other times such measures will coincide with the interests of the Legislature themselves, & that will be a reason not less cogent for pushing them. It may be thought that the people will not be deluded and misled in the latter case. But experience teaches another lesson. The press is indeed a great means of diminishing the evil, yet it is found to be unable to prevent it altogether.

Mr. L. MARTIN. Considered the association of the Judges with the Executive as a dangerous innovation; as well as one which⁵ could not produce the particular advantage expected from it. A knowledge of Mankind, and of Legislative affairs cannot be presumed to belong in a higher degree to the Judges than to the Legislature. And as to the Constitutionality of laws, that point will come before the Judges in their proper⁶ official character. In this character they have a negative on the laws. Join them with the Executive in the Revision and they will have a double negative. It is necessary that the Supreme Judiciary should have the confidence of the people. This will soon be lost, if they are employed in the task of remonstrating agst. popular measures of the Legislature. Besides in what mode & proportion are they to vote in the Council of Revision?

Mr. MADISON could not discover in the proposed association of the Judges with the Executive in the Revisionary check on the Legislature any violation of the maxim which requires the great departments of power to be kept separate & distinct. On the contrary he thought it an auxiliary precaution in favor of the maxim. If a Constitutional discrimination of the departments on paper were a sufficient security to each agst. encroachments of the others, all further provisions would indeed be superfluous. But experience had taught us a distrust of that security; and that it is necessary to introduce such a balance of powers and interests, as will guarantee the provisions on paper. Instead therefore of contenting ourselves with laying down the Theory in the Constitution that each department ought to be separate & distinct, it was proposed to add a defensive power to each which should maintain the Theory in practice. In so doing we did not blend the departments together. We erected effectual barriers for keeping them separate. The most regular example of this theory was in the British Constitution. Yet it was not only the practice there to admit the Judges to a seat in the legislature, and in the Executive Councils, and to submit to their previous examination all laws of a certain description, but it was a part of their Constitution that the Executive might negative any law whatever; a part of their Constitution which had been universally regarded as calculated for the preservation of the whole. The objection agst. a union of the Judiciary & Executive branches in the revision of the laws, had either no foundation or was not carried far enough. If such a Union was an improper mixture of powers, or such a Judiciary check on the laws, was inconsistent with the Theory of a free Constitution, it was equally so to admit the Executive to any participation in the making of laws; and the revisionary plan ought to be discarded altogether.

Col. MASON Observed that the defence of the Executive was not the sole object of the Revisionary power. He expected even greater advantages from it. Notwithstanding the precautions taken in the Constitution of the Legislature, it would still so much resemble that of the individual States, that it must be expected frequently to pass unjust and pernicious laws. This restraining power was therefore essentially necessary. It would have the effect not only of hindering the final passage of such laws; but would discourage demagogues from attempting to get them passed. It had been said by **Mr. L. Martin** that if the Judges were joined in this check on the laws, they would have a double negative, since in their expository capacity of Judges they would have one negative. He would reply that in this capacity they could impede in one case only, the operation of laws. They could declare an unconstitutional law void. But with regard to every law however unjust oppressive or pernicious, which⁷ did not come plainly under this description, they would be under the necessity as Judges to give it a free course. He wished the further use to be made of the Judges, of giving aid in preventing every improper law. Their aid will be the more valuable as they are in the habit and practice of considering laws in their true principles, and in all their consequences.

Mr. WILSON. The separation of the departments does not require that they should have separate objects but that they should act separately tho' on the same objects. It is necessary that the two branches of the Legislature should be separate and distinct, yet they are both to act precisely on the same object.

Mr. GERRY had rather give the Executive an absolute negative for its own defence than thus to blend together the Judiciary & Executive departments. It will bind them together in an offensive and defensive alliance agst. the Legislature, and render the latter unwilling to enter into a contest with them.

Mr. Govr. MORRIS was surprised that any defensive provision for securing the effectual separation of the departments should be considered as an improper mixture of them. Suppose that the three powers, were to be vested in three persons, by compact among themselves; that one was to have the power of making, another of executing, and a third of judging, the laws. Would it not be very natural for the two latter after having settled the partition on paper, to observe, and would not candor oblige the former to admit, that as a security agst. legislative acts of the former which might easily be so framed as to undermine the powers of the two others, the two others ought to be armed with a veto for their own defence, or at least to have an opportunity of stating their objections agst. acts of encroachment? And would any one pretend that such a right tended to blend & confound powers that ought to be

separately exercised? As well might it be said that If three neighbours had three distinct farms, a right in each to defend his farm agst. his neighbours, tended to blend the farms together.

Mr. GHORUM. All agree that a check on the Legislature is necessary. But there are two objections agst. admitting the Judges to share in it which no observations on the other side seem to obviate. the 1st. is that the Judges ought to carry into the exposition of the laws no prepossessions with regard to them.⁸ 2d. that as the Judges will outnumber the Executive, the revisionary check would be thrown entirely out of the Executive hands, and instead of enabling him to defend himself, would enable the Judges to sacrifice him.

Mr. WILSON. The proposition is certainly not liable to all the objections which have been urged agst. it. According to **Mr. Gerry** it will unite the Executive & Judiciary in an offensive & defensive alliance agst. the Legislature. According to **Mr. Ghorum** it will lead to a subversion of the Executive by the Judiciary influence. To the first gentleman the answer was obvious; that the joint weight of the two departments was necessary to balance the single weight of the Legislature. To the 1st. objection stated by the other Gentleman it might be answered that supposing the prepossession to mix itself with the exposition, the evil would be overbalanced by the advantages promised by the expedient. To the 2d. objection, that such a rule of voting might be provided in the detail as would guard agst. it.

Mr. RUTLIDGE thought the Judges of all men the most unfit to be concerned in the revisionary Council. The Judges ought never to give their opinion on a law till it comes before them. He thought it equally unnecessary. The Executive could advise with the officers of State, as of war, finance &c. and avail himself of their information & opinions.

On⁸ Question on **Mr. Wilson's** motion for joining the Judiciary in the Revision of laws it passed in the negative- Mas. no. Cont. ay. N. J. not present. Pa. divd. Del. no. Md. ay. Va. ay. N. C. no. S. C. no. Geo. divd.⁹ Resol. 10, giving the Ex. a qualified veto, without the amendt. was then agd. to nem. con.¹⁰

The motion made by **Mr. Madison** July 18.

¹¹& then postponed, 'that the Judges shd. be nominated by the Executive & such nominations become appointments unless disagreed to by 2/3 of the 2d. branch of the Legislature,' was now resumed.

Mr. MADISON stated as his reasons for the motion. 1.¹² that it secured the responsibility of the Executive who would in general be more capable & likely to select fit characters than the Legislature, or even the 2d. b. of it, who might hide their selfish motives under the number concerned in the appointment. -2.¹² that in case of any flagrant partiality or error, in the nomination it might be fairly presumed that 2/3 of the 2d. branch would join in putting a negative on it. 3.¹² that as the 2d. b. was very differently constituted when the appointment of the Judges was formerly referred to it, and was now to be composed of equal votes from all the States, the principle of compromise which had prevailed in other instances required in this that their shd. be a concurrence of two authorities, in one of which the people, in the other the States, should be represented. The Executive Magistrate wd.. be considered as a national officer, acting for and equally sympathising with every part of the U. States. If the 2d. branch alone should have this power, the Judges might be appointed by a minority of the people, tho' by a majority, of the States, which could not be justified on any principle as their proceedings were to relate to the people, rather than to the States: and as it would moreover throw the appointments entirely into the hands of ye. Northern States, a perpetual ground of jealousy & discontent would be furnished to the Southern States.

Mr. PINKNEY was for placing the appointmt. in the 2d. b. exclusively. The Executive will possess neither the requisite knowledge of characters, nor confidence of the people for so high a trust.

Mr. RANDOLPH wd.. have preferred the mode of appointmt. proposed formerly by **Mr. Ghorum**, as adopted in the Constitution of Massts. but thought the motion depending so great an improvement of the clause as it stands, that he anxiously wished it success. He laid great stress on the responsibility of the Executive as a security for fit appointments. Appointments by the Legislatures have generally resulted from cabal, from personal regard, or some other consideration than a title derived from the proper qualifications. The same inconveniencies will proportionally prevail, if the appointments be referred to either branch of the Legislature or to any other authority administered by a number of individuals.

Mr. ELSEWORTH would prefer a negative in the Executive on a nomination by the 2d. branch, the negative to be overruled by a concurrence of 2/3 of the 2d. b. to the mode proposed by the motion; but preferred an absolute appointment by the 2d. branch to either. The Executive will be regarded by the people with a jealous eye. Every power for augmenting unnecessarily his influence will be disliked. As he will be stationary it was not to be supposed he could have a better knowledge of characters. He will be more open to caresses & intrigues than the Senate. The right to supersede his nomination will be ideal only. A nomination under such circumstances will be equivalent to an appointment.

Mr. Govr. MORRIS supported the motion. 1.¹³ The States in their corporate capacity will frequently have an interest staked on the determination of the Judges. As in the Senate the States are to vote the Judges ought not to be appointed by the Senate. Next to the impropriety of being Judge in one's own cause, is the appointment of the Judge. 2. ¹³ It had been said the Executive would be uninformed of characters. The reverse was ye. truth. The Senate will be so. They must take the character of candidates from the flattering pictures drawn by their friends. The Executive in the necessary intercourse with every part of the U. S. required by the nature of his administration, will or may have the best possible information. 3. ¹³ It had been said that a jealousy would be entertained of the Executive. If the Executive can be safely trusted with the command of the army, there cannot surely be any reasonable ground of Jealousy in the present case. He added that if the objections agst. an appointment of the Executive by the Legislature, had the weight that had been allowed there must be some weight in the objection to an appointment of the Judges by the Legislature or by any part of it.

Mr. GERRY. The appointment of the Judges like every other part of the Constitution shd. be so modelled as to give satisfaction both to the people and to the States. The mode under consideration will give satisfaction to neither. He could not conceive that the Executive could be as well informed of characters throughout the Union, as the Senate. It appeared to him also a strong objection that 2/3 of the Senate were required to reject a nomination of the Executive. The Senate would be constituted in the same manner as Congress. And the appointments of Congress have been generally good.

Mr. MADISON, observed that he was not anxious that 2/3 should be necessary to disagree to a nomination. He had given this form to his motion chiefly to vary it the more clearly from one which had just been rejected. He was content to obviate the objection last made, and accordingly so varied the motion as to let a majority reject.

Col. MASON found it his duty to differ from his colleagues in their opinions & reasonings on this subject. Notwithstanding the form of the proposition by which the appointment seemed to be divided between the Executive & Senate, the appointment was substantially vested in the former alone. The false complaisance which usually prevails in such cases will prevent a disagreement to the first nominations. He considered the appointment by the Executive as a dangerous prerogative. It might even give him an influence over the Judiciary department itself. He did not think the difference of interest between the Northern and Southern States could be properly brought into this argument. It would operate & require some precautions in the case of regulating navigation, commerce & imposts; but he could not see that it had any connection with the Judiciary department.

On the question, the motion now being¹⁴ that the executive should nominate, & such nominations should become appointments unless disagreed to by the Senate” Mas. ay. Ct. no. Pa. ay. Del. no. Md. no. Va. ay. N. C. no. S. C. no. Geo. no.¹⁵

On¹⁶ question for agreeing to the clause as it stands by which the Judges are to be appointed by¹⁶ 2d. branch Mas. no. Ct. ay. Pa. no. Del. ay. Md. ay. Va. no. N. C. ay. S. C. ay. Geo. ay.¹⁷

Adjourned

August 15, 1787 – IN CONVENTION

Mr. MADISON moved that all acts before they become laws should be submitted both to the Executive and Supreme Judiciary Departments, that if either of these should object 2/3 of each House, if both should object, 3/4 of each House, should be necessary to overrule the objections and give to the acts the force of law-7

See the motion at large in the Journal of this date, page 253, & insert it here.”⁸

[“Every bill which shall have passed the two houses, shall, before it become a law, be severally presented to the President of the United States, and to the judges of the supreme court for the revision of each. If, upon such revision, they shall approve of it, they shall respectively signify their approbation by signing it; but if, upon such revision, it shall appear improper to either, or both, to be passed into a law, it shall be returned, with the objections against it, to that house, in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider the bill: but if, after such reconsideration, two thirds of that house, when either the President, or a majority of the judges shall object, or three fourths, where both shall object, shall agree to pass it, it shall, together with the objections, be sent to the other house, by which it shall likewise be reconsidered; and, if approved by two thirds, or three fourths of the other house, as the case may be, it shall become a law.”]

Mr. WILSON seconds the motion

Mr. PINKNEY opposed the interference of the Judges in the Legislative business: it will involve them in parties, and give a previous tincture to their opinions.

Mr. MERCER heartily approved the motion. It is an axiom that the Judiciary ought to be separate from the Legislative: but equally so that it ought to be independent of that department. The true policy of the axiom is that legislative usurpation and oppression may be obviated. He disapproved of the Doctrine that the Judges as expositors of the Constitution should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be uncontrollable.

Mr. GERRY. This motion comes to the same thing with what had been already negatived.

¹⁰Question on the motion of Mr. Madison.

N. H. no. Mass. no. Ct. no. N. J. no. Pa. no. Del. ay. Maryd. ay. Virga. ay. N. C. no. S. C. no. Geo. no.¹¹

Mr. Govr. MORRIS regretted that something like the proposed check could not be agreed to. He dwelt on the importance of public credit, and the difficulty of supporting it without some strong barrier against the instability of legislative Assemblies. He suggested the idea of requiring three fourths of each house to repeal laws where the President should not concur. He had no great reliance on the revisionary power as the Executive was now to be constituted [elected by the¹² Congress]. The legislature will contrive to soften down the President. He recited the history of paper emissions, and the perseverance of the legislative assemblies in repeating them, with all the distressing effects of such measures before their eyes. Were the National legislature formed, and a war was now to break out, this ruinous expedient would be again resorted to, if not guarded against. The requiring 3/4 to repeal would, though not a complete remedy, prevent the hasty passage of laws, and the frequency of those repeals which destroy faith in the public, and which are among our greatest calamities.-

Mr. DICKENSON was strongly impressed with the remark of Mr. Mercer as to the power of the Judges to set aside the law. He thought no such power ought to exist. He was at the same time at a loss what expedient to substitute. The Justiciary of Arragon he observed became by degrees, the lawgiver.

Mr. Govr. MORRIS, suggested the expedient of an absolute negative in the Executive. He could not agree that the Judiciary which was part of the Executive, should be bound to say that a direct violation of the Constitution was law. A controul over the legislature might have its inconveniences. But view the danger on the other side. The most virtuous Citizens will often as members of a legislative body concur in measures which afterwards in their private capacity they will be ashamed of. Encroachments of the popular branch of the Government ought to be guarded agst. The Ephori at Sparta became in the end absolute. The Report of the Council of Censors in Pennsylv. points out the many invasions of the legislative department on the Executive numerous as the latter¹³ is, within the short term of seven years, and in a State where a strong party is opposed to the Constitution, and watching every occasion of turning the public resentments agst. it. If the Executive be overturned by the popular branch, as happened in England, the tyranny of one man will ensue. In Rome where the Aristocracy overturned the throne, the consequence was different. He enlarged on the tendency of the legislative Authority to usurp on the Executive and wished the section to be postponed, in order to consider of some more effectual check than requiring 2/3 only to overrule the negative of the Executive.

Mr. SHERMAN. Can one man be trusted better than all the others if they all agree? This was neither wise nor safe. He disapproved of Judges meddling in politics and parties. We have gone far enough in forming the negative as it now stands.

Mr. CARROL. when the negative to be overruled by 2/3 only was agreed to, the quorum was not fixed. He remarked that as a majority was now to be the quorum, 17. in the larger, and 8 in the smaller house might carry points. The advantage that might be taken of this seemed to call for greater impediments to improper laws. He thought the controuling power however of the Executive could not be well decided, till it was seen how the formation of that department would be finally regulated. He wished the consideration of the matter to be postponed.

Mr. GHORUM saw no end to these difficulties and postponements. Some could not agree to the form of Government before the powers were defined. Others could not agree to the powers till it was seen how the Government was to be formed. He thought a majority as large a quorum as was necessary. It was the quorum almost every where fixt in the U. States.

Mr. WILSON; after viewing the subject with all the coolness and attention possible was most apprehensive of a dissolution of the Govt. from the legislature swallowing up all the other powers. He remarked that the prejudices agst. the Executive resulted from a misapplication of the adage that the parliament was the palladium of liberty. Where the Executive was really formidable, King and Tyrant, were naturally associated in the minds of people; not legislature and tyranny. But where the Executive was not formidable, the two last were most properly associated. After the destruction of the King in Great Britain, a more pure and unmixed tryanny sprang up in the parliament than had been exercised by the monarch. He insisted that we had not guarded agst. the danger on this side by a sufficient self-defensive power either to the Executive or Judiciary department.

Mr. RUTLIDGE was strenuous agst. postponing; and complained much of the tediousness of the proceedings.

Mr. ELSEWORTH held the same language. We grow more & more skeptical as we proceed. If we do not decide soon, we shall be unable to come to any decision.

The question for postponement passed in the negative: Del: & Maryd. only being in the affirmative.

Mr. WILLIAMSON moved to change " 2/3 of each House" into " 3/4 as requisite to overrule the dissent of the President. He saw no danger in this, and preferred giving the power to the Presidt. alone, to admitting the Judges into the business of legislation.

Mr. WILSON 2ds. the motion; referring to and repeating the ideas of Mr. Carroll.

On this motion for 3/4 . instead of two thirds; it passed in the affirmative

N. H. no. Mas. no. Ct. ay. N. J. no. Pena. divd. Del. ay. Md. ay. Va. ay. N. C. ay. S. C. ay. Geo. no.¹⁵

Mr. MADISON, observing that if the negative of the President was confined to bills; it would be evaded by acts under the form and name of Resolutions, votes &c, proposed that or resolve" should be added after "bill" in the beginning of sect 13. with an exception as to votes of adjournment &c.-after a short and rather confused conversation on the subject, the question was put & rejected, the States¹⁶ being as follows,

N. H. no. Mas. ay. Ct. no. N. J. no. Pena. no. Del. ay. Md. no. Va. no. N. C. ay. S. C. no. Geo. no.¹⁷

"Ten¹⁸ days (Sundays excepted)" instead of "seven" were allowed to the President for returning bills with his objections N. H. & Mas: only voting agst. it.

The 13 Sect: of art. VI as amended was then agreed to.

Adjourned

August 27, 1787 – IN CONVENTION

Docr. JOHNSON suggested that the judicial power ought to extend to equity as well as law-and moved to insert the words “both in law and equity” after the words “U. S.” in the 1st. line, of sect. 1.

Mr. READ objected to vesting these powers in the same Court.

On the question

N. H. ay. Mas. absent. Ct. ay. N. J. abst. P. ay. Del. no. Md. no. Virga. ay. N. C. abst. S. C. ay. Geo. ay.⁷

On the question to agree to Sect. 1. art. XI. as amended.⁸

N. H. ay. Mas. abst. Ct. ay. Pa. ay. N. J. abst. Del. no.

Md. no. Va. ay. N. C. abst. S. C. ay. Geo. ay.

Mr. DICKINSON moved as an amendment to sect. 2. art XI ⁵ after the words “good behavior” the words “provided that they may be removed by the Executive on the application by the Senate and House of Representatives.”

Mr. GERRY ²ded. the motion

Mr. Govr. MORRIS thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removeable without a trial. Besides it was fundamentally wrong to subject Judges to so arbitrary an authority.

Mr. SHERMAN saw no contradiction or impropriety if this were made part of the constitutional regulation of the Judiciary establishment. He observed that a like provision was contained in the British Statutes.

Mr. RUTLIDGE. If the Supreme Court is to judge between the U. S. and particular States, this alone is an insuperable objection to the motion.

Mr. WILSON considered such a provision in the British Government as less dangerous than here, the House of Lords & House of Commons being less likely to concur on the same occasions. Chief Justice Holt, he remarked, had successively offended by his independent conduct, both houses of Parliament. Had this happened at the same time, he would have been ousted. The judges would be in a bad situation if made to depend on every⁹ gust of faction which might prevail in the two branches of our Govt.

Mr. RANDOLPH opposed the motion as weakening too much the independence of the Judges.

Mr. DICKINSON was not apprehensive that the Legislature composed of different branches constructed on such different principles, would improperly unite for the purpose of displacing a Judge.

On the question for agreeing to **Mr. Dickinson’s** Motion¹⁰

N. H. no. Mas. abst. Ct. ay. N. J. abst. Pa. no. Del. no. Md. no. Va. no. N. C. abst. S. C. no. Geo. no.

On the question on Sect. 2. art: XI as reported. Del & Maryd. only no.

Mr. MADISON and **Mr. Mc.HENRY** moved to reinstate the words “increased or” before the word “diminished” in the 2d. sect. art XI.

Mr. Govr. MORRIS opposed it for reasons urged by him on a former occasion-

Col: MASON contended strenuously for the motion. There was no weight he said in the argument drawn from changes in the value of the metals, because this might be provided for by an increase of salaries so made as not to affect persons in office, and this was the only argument on which much stress seemed to have been laid.

Genl. PINKNEY. The importance of the Judiciary will require men of the first talents: large salaries will therefore be necessary, larger than the U. S. can allow¹¹ in the first instance. He was not satisfied with the expedient mentioned by Col: Mason. He did not think it would have a good effect or a good appearance, for new Judges to come in with higher salaries than the old ones.

Mr. Govr. MORRIS said the expedient might be evaded & therefore amounted to nothing. Judges might resign, and then be reappointed to increased salaries.

On the question

N. H. no. Ct. no. Pa. no. Del. no. Md. divid. Va. ay. S. C. no. Geo. abst. also Mas. N. J. & N. C.¹²

Mr. RANDOLPH & Mr. MADISON then moved to add the following words to sect. 2. art XI. “nor increased by any Act of the Legislature which shall operate before the expiration of three years after the passing thereof”

On this question

N. H. no. Ct. no. Pa. no. Del. no. Md. ay. Va. ay. S. C. no. Geo. abst. also Mas. N. J. & N. C.¹³

Sect. 3. art. XI¹⁴ being taken up, the following clause was postponed- viz. “to the trial of impeachments of officers of the U. S.” by which the jurisdiction of the supreme Court was extended to such cases.

Mr. MADISON & Mr. Govr. MORRIS moved to insert after the word “controversies” the words “to which the U. S. shall be a party.” which was agreed to nem: con:

Docr. JOHNSON moved to insert the words “this Constitution and the” before the word “laws”

Mr. MADISON doubted whether it was not going too far to extend the jurisdiction of the Court generally to cases arising under the Constitution & whether it ought not to be limited to cases of a Judiciary Nature. The right of expounding the Constitution in cases not of this nature ought not to be given to that Department.

The motion of Docr. Johnson was agreed to nem: con: it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.

On motion of Mr. RUTLIDGE the words “passed by the Legislature” were struck out, and after the words “U. S” were inserted nem: con: the words “and treaties made or which shall be made under their authority” conformably to a preceding amendment in another place.

The clause “in cases of impeachment,” was postponed.

Mr. Govr. MORRIS wished to know what was meant by the words “In all the cases before mentioned it [jurisdiction] shall be appellate with such exceptions &c,” whether it extended to matters of fact as well as law-and to cases of Common law as well as Civil law.

Mr. WILSON. The Committee he believed meant facts as well as law & Common as well as Civil law. The jurisdiction of the federal Court of Appeals had he said been so construed.

Mr. DICKINSON moved to add after the word “appellate” the words both as to law & fact which was agreed to nem: con:

Mr. MADISON & Mr. Govr. MORRIS moved to strike out the beginning of the 3d. sect. "The jurisdiction of the supreme Court" & to insert the words "the Judicial power" which was agreed to nem: con:

The following motion was disagreed to, to wit to insert "In all the other cases before mentioned the Judicial power shall be exercised in such manner as the Legislature shall direct"

Del. Virga. ay¹⁵

N. H Con. P. M. S. C. G no¹⁶

On a question for striking out the last sentence of sect. 3.

"The Legislature may assign &c."¹⁷

N. H. ay. Ct. ay. Pa. ay. Del. ay. Md. ay. Va. ay. S. C. ay. Geo. ay. ¹⁸

Mr. SHERMAN moved to insert after the words "between Citizens of different States" the words, "between Citizens of the same State claiming lands under grants of different States"-according to the provision in the 9th. Art: of the Confederation-which was agreed to nem: con:

Adjourned

Activity 2 – The Opinion of Chief Justice John Marshall

In delivering the opinion for the majority of the Supreme Court, Chief Justice John Marshall helped to establish the judiciary as a viable branch of government under the Constitution by giving up some power in order to get more – the power of judicial review. What were the key parts of the decision and how did the decision help solidify the power and function of the Supreme Court? Students will analyze key excerpts of the opinion in [*Marbury v. Madison*](#) and through close textual analysis answer key questions for discussion. These answers will be used to write a persuasive essay on the power of judicial review.

Directions: Read the excerpts from [*Marbury v. Madison*](#) below and use them to answer the following questions. Use a separate sheet of paper if necessary:

- In the Court's opinion is Marbury entitled to his commission? Explain?
- According to the decision, does the Supreme Court have the authority to issue a writ of mandamus and thereby force Secretary of State Madison to deliver the commission?
- According to the decision, what happens if an act of legislation is repugnant to the Constitution?
- If the Supreme Court had gone ahead and issued the writ of mandamus, could it have forced Madison to comply with its order? What would have happened to the power of the court if they issued the writ of mandamus and it was ignored by the executive branch?
- Chief Justice John Marshall gave up some power for the Court in order to get more. What power was given up and what power was gained? Explain. Why was this an important decision by Marshall?

Discussion Questions for Activity 2

Directions: After reading the excerpts from *Marbury v. Madison* use your knowledge to answer the discussion questions below. This may be done individually or in groups. Make sure to write your answers in paragraph form on a separate sheet of paper if needed.

- What were the reasons for Chief Justice John Marshall using the idea of judicial review to make the case in Marbury v. Madison?

- What power did the Court give up in this case and what power did they gain? Why is this significant to the status and power of the Supreme Court with the three branch system?

Marbury v. Madison

Key Excerpts from the Majority Opinion

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

In the order in which the Court has viewed this subject, the following questions have been considered and decided.

1. Has the applicant a right to the commission he demands?
2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?
3. If they do afford him a remedy, is it a mandamus issuing from this court?

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

Mr. Marbury, then, since his commission was signed by the President and sealed by the Secretary of State, was appointed, and as the law creating the office gave the officer a right to hold for five years independent of the Executive, the appointment was not revocable, but vested in the officer legal rights which are protected by the laws of his country.

To withhold the commission, therefore, is an act deemed by the Court not warranted by law, but violative of a vested legal right.

This brings us to the second inquiry, which is:

2. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain, the King himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court

It is then the opinion of the Court:

1. That, by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the County of Washington in the District of Columbia, and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment, and that the appointment conferred on him a legal right to the office for the space of five years.
2. That, having this legal title to the office, he has a consequent right to the commission, a refusal to deliver which is a plain violation of that right, for which the laws of his country afford him a remedy.

It remains to be inquired whether,

3. He is entitled to the remedy for which he applies. This depends on:

1. The nature of the writ applied for, and
2. The power of this court.

1. The nature of the writ. ...

It is true that the mandamus now moved for is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission, on which subjects the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has, to that commission, a vested legal right of which the Executive cannot deprive him.

This, then, is a plain case of a mandamus, either to deliver the commission or a copy of it from the record, and it only remains to be inquired:

[2.] Whether it can issue from this Court.

The act to establish the judicial courts of the United States [Judiciary Act of 1789] authorizes the Supreme Court “to issue *writs of mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.”

The Secretary of State, being a person, holding an office under the authority of the United States, is precisely within the letter of the description, and if this Court is not authorized to issue a *writ of mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.

The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case, because the right claimed is given by a law of the United States.

In the distribution of this power, it is declared that “The Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, the Supreme Court shall have appellate jurisdiction.”

If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage — is entirely without meaning — if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction where the Constitution has declared their jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution, is form without substance.

To enable this court then to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. ...

It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted, and does not create that case. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this to enable the Court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States to issue writs of mandamus to public officers appears not to be warranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act.

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered by this Court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions — a written Constitution, would of itself be sufficient, in America where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained. ...

It is also not entirely unworthy of observation that, in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written Constitutions that a law repugnant to the Constitution is void, and that courts, as well as other departments, are bound by that instrument.

The rule must be discharged.

Activity 3 – Important Documents: Document Based Questions on Judicial Review

The Founding period provides many diverse and interesting opinions about the power of judicial review. These opinions provide a range of differing attitudes about the power and who should be entitled to it under the Constitution. What are some of these differences of opinions and how did they ultimately influence the power of the Courts? Students will evaluate various excerpts from the Founding on the power of judicial review and will answer the scaffolding questions about each document. Using the information from the documents, they will answer the key question in an organized essay which will include interpretations of the documents.

Directions: Read the excerpts below and answer the scaffolding questions that follow each document. The key question is in Assessment 1 and is part of Activity 2 and 3.

Document 1 – Brutus XV

(T)he supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.

There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

The power of this court is in many cases superior to that of the legislature. I have shewed, in a former paper, that this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power. The legislature can only exercise such powers as are given them by the constitution, they cannot assume any of the rights annexed to the judicial, for this plain reason, that the same authority which vested the legislature with their powers, vested the judicial with theirs – both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the legislature, as the legislature do of the judicial. – The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgment of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme – and no law, explanatory of the constitution, will be binding on them.

Had the construction of the constitution been left with the legislature, they would have explained it at their peril; if they exceed their powers, or sought to find, in the spirit of the constitution, more than was expressed in the letter, the people from whom they derived their power could remove them, and do themselves right; and indeed I can see no other remedy that the people can have against their rulers for

encroachments of this nature. A constitution is a compact of a people with their rulers; if the rulers break the compact, the people have a right and ought to remove them and do themselves justice; but in order to enable them to do this with the greater facility, those whom the people chuse at stated periods, should have the power in the last resort to determine the sense of the compact; if they determine contrary to the understanding of the people, an appeal will lie to the people at the period when the rulers are to be elected, and they will have it in their power to remedy the evil; but when this power is lodged in the hands of men independent of the people, and of their representatives, and who are not, constitutionally, accountable for their opinions, no way is left to controul them but *with a high hand and an outstretched arm*.

- **What is Brutus' argument about the power of the judiciary?**
- **What can judges do with laws inconsistent with the Constitution?**
- **Where should the power of construction have been laid? Why?**

Document 2 – Brutus XII

Perhaps the judicial power will not be able, by direct and positive decrees, ever to direct the legislature, because it is not easy to conceive how a question can be brought before them in a course of legal discussion, in which they can give a decision, declaring, that the legislature have certain powers which they have not exercised, and which, in consequence of the determination of the judges, they will be bound to exercise. But it is easy to see, that in their adjudications they may establish certain principles, which being received by the legislature, will enlarge the sphere of their power beyond all bounds.

It is to be observed, that the supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature. The latter can no more deprive the former of this right, than either of them, or both of them together, can take from the president, with the advice of the senate, the power of making treaties, or appointing ambassadors.

In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers. This appears evident from this consideration, that if the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior. The legislature, therefore, will not go over the limits by which the courts may adjudge they are confined. And there is little room to doubt but that they will come up to those bounds, as often as occasion and opportunity may offer, and they may judge it proper to do it. For as on the one hand, they will not readily pass laws which they know the courts will not execute, so on the other, we may be sure they will not scruple to pass such as they know they will give effect, as often as they may judge it proper.

From these observations it appears, that the judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers.

- **What power does Brutus believe the judicial branch has under the Constitution?**
- **How will this power affect the legislature?**

Document 3 – *Federalist 78*

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course; to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

- **Why does Publius believe the judiciary is the “least dangerous” branch?**
- **What branch has the ability to interpret the laws? Why?**
- **According to Publius, is the judiciary superior to the legislature?**

Document 4 – *Federalist 81*

The arguments or rather suggestions, upon which this charge is founded are to this effect: “The authority of the proposed Supreme Court of the United States, which is to be a separate and independent body, will be superior to that of the legislature. The power of construing the laws according to the *spirit* of the

Constitution will enable that court to mould them into whatever shape it may think proper; especially as its decisions will not be in any manner subject to the revision or correction of the legislative body. This is as unprecedented as it is dangerous.

In the first place, there is not a syllable in the plan under consideration which *directly* empowers the national courts to construe the laws according to the spirit of the Constitution, or which gives them any greater latitude in this respect than may be claimed by the courts of every State. I admit, however, that the Constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the Constitution. But this doctrine is not deducible from any circumstance peculiar to the plan of convention, but from the general theory of a limited Constitution; and as far as it is true is equally applicable to most if not to all the State governments. There can be no objection, therefore, on this account to the federal judicature which will not lie against the local judicatures in general, and which will not serve to condemn every constitution that attempts to set bounds to legislative discretion

- **What power does Publius say is “dangerous”? Does he believe the judiciary should have a power like this?**
- **What should be the standard for all laws?**

Document 5 – [Article III of the U.S. Constitution](#)

Section. 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

- **According to the Constitution, what are the powers of the Supreme Court?**

Document 6 – [Article VI of the U.S. Constitution \(Supremacy Clause\)](#)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

- **According to the Constitution, what is the power of the Constitution?**
- **Does this support the argument of Publius or Brutus? How?**

Document 7 – [Marbury v. Madison](#)

The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States to issue writs of mandamus to public officers appears not to be warranted by the Constitution, and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.

So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power to say that, in using it, the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained. ...

➤ **Who has the power to interpret the Constitution according to this case? Why?**

Document 8 – Thomas Jefferson to Spencer Roane, 1819

(A)fter twenty years' confirmation of the federal system by the voice of the nation, declared through the medium of elections, we find the judiciary on every occasion, still driving us into consolidation.

In denying the right they usurp of exclusively explaining the constitution, I go further than you do, if I understand rightly your quotation from the *Federalist*, of an opinion that "the judiciary is the last resort in relation to the other departments of the government, but not in relation to the rights of the parties to the compact under which the judiciary is derived." If this opinion be sound, then indeed is our constitution a complete *felo de se*. For intending to establish three departments, co-ordinate and independent, that they might check and balance one another, it has given, according to this opinion, to one of them alone, the right to prescribe rules for the government of the others, and to that one too, which is unelected by, and independent of the nation. For experience has already shown that the impeachment it has provided is not even a scarecrow; that such opinions as the one you combat, sent cautiously out, as you observe also, by

detachment, not belonging to the case often, but sought for out of it, as if to rally the public opinion beforehand to their views, and to indicate the line they are to walk in, have been so quietly passed over as never to have excited animadversion, even in a speech of any one of the body entrusted with impeachment. The constitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary, which they may twist, and shape into any form they please.

It should be remembered, as an axiom of eternal truth in politics, that whatever power in any government is independent, is absolute also; in theory only, at first, while the spirit of the people is up, but in practice, as fast as that relaxes. Independence can be trusted nowhere but with the people in mass. They are inherently independent of all but moral law. My construction of the constitution is very different from that you quote. It is that each department is truly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially, where it is to act ultimately and without appeal.

- **How does Jefferson's description of the judicial branch compare to that of Publius Brutus?**
- **According to Jefferson, who has the power of review of the Constitution?**

Discussion Questions for Activity 3

Directions: After reading the excerpts from various writings about judicial review, use your knowledge to answer the discussion questions below. This may be done individually or in groups. Make sure to write your answers in paragraph form on a separate sheet of paper if needed.

- Who do some of the authors of the documents believe should have the power of judicial review? Who should have this power according to the Constitution?
- Does the Supremacy Clause of the [Article VI](#) validate the power of judicial review given to the Courts? If the Founders wanted the Courts to have this power, why didn't they specifically put the words in the Constitution?

Assessments for Lesson 2

Assessment 1 – The students will read the opinion of Chief Justice John Marshall on [*Marbury v. Madison*](#), [*Federalist 78*](#), and [*Brutus XV*](#) along with the other documents in Activity 3 and compare all arguments involved in the power of judicial review. They will then compose a persuasive essay on the following:

- Using all the documents for review, write a persuasive essay arguing whether or not the Supreme Court of the United States should have the power to overturn acts of the legislative branch or executive branch that they deem to be unconstitutional. Make sure to use quotes and examples from the documents to support your position. The assessment rubric is included.

Assessment 2 - The students will read the opinion of Chief Justice John Marshall on [*Marbury v. Madison*](#), [*Federalist 78*](#), and [*Brutus XV*](#) along with the other documents in Activity 3 and compare all arguments involved in the power of judicial review. Using all the information from the documents and answer the questions about the following scenario. Make sure to use quotes and examples from the documents to support your position.

- **Constitutional Scenario** – The Congress of the United States has heard complaints about the lack of knowledge voters have about elections and they believe it is compromising the results of important races and government issues in federal elections. In order to try and solve this problem, Congress passes a law requiring all eligible voters to take a “competency and knowledge test” prior to voting in an election. The voter must pass the test with at least 90% accuracy in order to cast a ballot and vote. The President signs the law and says he will make sure the proper administration of the test takes place at all polling locations. He will also have use armed military personnel at each polling location to enforce compliance with the law and make sure there are no disruptions of the election process.
 - Can anything be done to in this situation to safeguard the people and their constitutional rights? If so, what?
 - Without the “sword” or the “purse,” what can the Supreme Court do if the other two branches refuse to abide by their decision that this law is unconstitutional?
 - Does the fact that the Court has the power to review actions of the other two branches relieve these two branches of their obligation to uphold their Constitutional duties?

- Is it possible for the United States to have a functioning and working government without the power of judicial review? How could a system without this power be organized and still protect the fundamental law of the Constitution?

Rubric for Assessment 1

Persuasive Essay Rubric: Common Core for Reading and Writing Standards

Based on Common Core Standards for Reading/Writing in History/Social Sciences (www.corestandards.org)

Note: Students must MEET or EXCEED standard on the asterisked indicators in order to meet standard on the essay

	Exceeds Standard (A)	Meets Standard (B)	Almost to Standard MUST REWRITE	Below
Standard=no R/W				
Thesis/Claim	<input type="checkbox"/> Thesis/Claim is precise, knowledgeable, significant, and distinguished from alternate or opposing claims	<input type="checkbox"/> Thesis/Claim is precise and knowledgeable, and answers the prompt (W1)	<input type="checkbox"/> Thesis/Claim may be unclear or irrelevant, and/or may not answer prompt	<input type="checkbox"/> Thesis/Claim is missing
*Use of Evidence	<input type="checkbox"/> Develops the topic thoroughly by selecting the most significant and relevant facts, concrete details, quotations, or other information and examples from the text(s) <input type="checkbox"/> Skillfully integrates information into the text selectively to maintain the flow of ideas and advance the thesis <input type="checkbox"/> Skillfully assesses the strengths and limitations of each source	<input type="checkbox"/> Develops the topic by selecting significant and relevant facts, concrete details, quotations, or other information and examples from the text(s) (W2) <input type="checkbox"/> Integrates information into the text selectively to maintain the flow of ideas and advance the thesis (W8) <input type="checkbox"/> Assesses the strengths and limitations of each source (W8)	<input type="checkbox"/> Attempts to develop the topic using facts and other information, but evidence is inaccurate, irrelevant, and/or insufficient <input type="checkbox"/> Attempts to integrate information into the text selectively to maintain the flow of ideas and advance the thesis, but information is insufficient or irrelevant <input type="checkbox"/> Attempts to assess the strengths and limitations of each source, but misinterprets information	<input type="checkbox"/> Does not develop the topic by selecting information and examples from the text(s) <input type="checkbox"/> Does not integrate information from the text <input type="checkbox"/> Does not assess the strengths and limitations of each source
*Use of Analysis	<input type="checkbox"/> Skillfully draws evidence from informational texts to support analysis and thesis/claim <input type="checkbox"/> Skillfully delineates and evaluates the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient <input type="checkbox"/> Skillfully identifies false statements and fallacious reasoning	<input type="checkbox"/> Draws evidence from informational texts to support analysis and thesis/claim (W9) <input type="checkbox"/> Delineates and evaluates the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient (R8) <input type="checkbox"/> Identifies false statements and fallacious reasoning (R8)	<input type="checkbox"/> Attempts to draw evidence from informational texts to support analysis and thesis/claim but evidence is insufficient and/or irrelevant <input type="checkbox"/> Attempts to delineate and evaluate the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient, but analysis is insufficient <input type="checkbox"/> Attempts to identify false statements and fallacious reasoning, but argument is incomplete or insufficient	<input type="checkbox"/> Does not use evidence from the informational texts to support analysis and/or thesis/claim <input type="checkbox"/> Does not delineate or evaluate claims in text <input type="checkbox"/> Does not identify false claims or fallacious reasoning
*Organization, Writing Style and Conventions	<input type="checkbox"/> Organization skillfully sequences the claim(s), counterclaims, reasons, and evidence. <input type="checkbox"/> Provides a concluding statement or section that skillfully follows from or supports the argument presented <input type="checkbox"/> Skillfully produces clear, coherent, sophisticated writing in which the development, organization, and style are appropriate to task, purpose, and audience	<input type="checkbox"/> Organization logically sequences the claim(s), counterclaims , reasons, and evidence. (W1) <input type="checkbox"/> Provides a concluding statement or section that follows from or supports the argument presented (W1) <input type="checkbox"/> Produces clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience (W4)	<input type="checkbox"/> Attempts to create a logical organization, but may be missing some elements of the assignment, such as a counterclaim <input type="checkbox"/> Attempts to provide a concluding statement or section that follows from or supports the argument presented, but statement does not support thesis <input type="checkbox"/> Attempts to produce clear and coherent writing, but errors in conventions and writing style detract from understanding	<input type="checkbox"/> Does not provide logical organization <input type="checkbox"/> Does not provide a concluding statement or section that follows from or supports the argument presented <input type="checkbox"/> Does not produce clear and coherent writing

Score for this draft: _____

Teacher notes and additional comments:

Publius vs. Brutus and the Debate over the “Least Dangerous” Branch

Lesson 3 – *Cooper v. Aaron*: The Controversial Claim of Judicial Supremacy

Introduction

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby,

- [Supremacy Clause of Article VI of the United States Constitution](#)

In [Brown v. Board of Education \(1954\)](#), a unanimous Supreme Court ruled that segregation in public schools was unconstitutional. After the decision, many southern states were slow to implement the *Brown* decision into their public schools while others attempted to find ways to perpetuate segregation. Absent the power of the “purse” or “sword,” the Court was unable to force southern states to comply with the decision.

In the wake of state non-compliance and the crisis at [Central High School in Little Rock, Arkansas](#), the Supreme Court decided to hear the case of [Cooper v. Aaron](#) on appeal. The case presented a particular challenge to the court’s own authority since the plaintiffs argued that the failure of the state of Arkansas to implement the court’s desegregation orders had violated their entitlement to the equal protection of the laws. In a special session of the Court, in September, 1958, the Supreme Court handed down its unanimous decision declaring that it was the judiciary that had the final say over the proper interpretation of law. State governments were not free to enact and enforce legislation that proffered a different interpretation of the law.

In the decision, the Supreme Court emphatically stated that it was the domain of the court to explain what the law is. According to the court’s decision in [Cooper](#), the Supreme Court is the sole interpreter of the Constitution and in this area is supreme over all other branches of government.

This lesson will concentrate on the Supreme Court’s decision in [Cooper v. Aaron](#) and whether this case changed the dynamic between the three branches of government in regard to interpretation of the Constitution. By looking back at the Founding period and the themes of the original debates about the Constitution and the judiciary, students will examine the decision of the Court, and will decide if the Supreme Court went too far in claiming judicial supremacy. By examining the history of the case and its Constitutional implications, students will gain a better understanding of the changing power of the modern day Supreme Court.

Guided Questions

- What significant changes were made to the power and function of the Supreme Court with the critical decision in [Cooper v. Aaron](#)?

- What historical arguments regarding judicial supremacy were made during the ratification debates between Publius and Brutus concerning the proposed Constitution and judicial power?
- Since the decision in [Cooper v. Aaron](#), have the other two branches simply allowed the Supreme Court to be the sole interpreter of the Constitution?

Learning Objectives

After this lesson students will be able to:

- Analyze the debates between Publius and Brutus and illustrate the differences in the arguments pertaining to so-called judicial supremacy within the Constitution.
- Explain the key components of the majority decision in the Supreme Court case [Cooper v. Aaron](#).
- Examine other Supreme Court decisions and assess whether the other two government branches have been compliant to judicial supremacy.
- Support an argument for or against judicial supremacy through an examination of primary source documents.

Background

In the 1958 case of [Cooper v. Aaron](#), the Supreme Court claimed that it was “supreme in the exposition of the law of the Constitution.” In the decision, the Court invoked language from [the Supremacy Clause of the Constitution](#) and from the landmark case, [Marbury v. Madison](#), to declare its position. Was the Court correct in its contention that it alone had the final authority to explain the meaning of the Constitution? Critics of the Court’s decision believed they had gone too far in trying to seize constitutional power.

More than one hundred and seventy years earlier, the Framers of the Constitution were debating the same issues about the powers given to an independent judiciary within the framework of a new government. Some of the critics of the new Constitution were also worried about a supreme judiciary that would “give a construction to the constitution and every part of it.” They believed the court would eventually become too independent and there would be no one to control their decisions. Was the strong language in [Cooper](#) an indictment on the Federalist vision of an independent judiciary or was it a historically correct prediction by the Antifederalists of an all too powerful Supreme Court? The historical setting and the constitutional crisis surrounding the case may give us an answer.

In [Brown v. Board of Education \(1954\)](#), the Supreme Court ruled that segregating students by race in public schools was a violation of the [Fourteenth Amendment](#) and was therefore unconstitutional. In a subsequent case, [Brown II](#), the Court ordered the states to integrate their public schools “with all deliberate speed.” This ambiguous enforcement order fortified resistance and brought unanticipated defiance from many Southern states.

The school district in Little Rock, Arkansas tried to comply with the Supreme Court decision. They quickly developed a court-approved plan to integrate public schools and starting in

September of 1957, nine black students would attend [Central High School](#) and begin the process of integration. The day before this process was to begin, Arkansas Governor Orval Faubus, ordered the state's National Guard to stop black students from entering the school. Claiming that public order needed to be preserved, he denied that he was defying a decision of the Supreme Court and Little Rock burst on the national stage as the center of the fight against federally mandated school integration.

The focus of the conflict would shift to Washington D.C. as President Dwight Eisenhower tried to persuade Governor Faubus to revoke his orders to the National Guard and allow the nine students to integrate the school. The Eisenhower administration was left with the impression that the Governor would do as asked and allow the students to go to school, but instead he returned to Arkansas and did nothing. A few days later a federal district court issued an injunction permitting the students to attend [Central High School](#). Governor Faubus immediately removed the National Guard and the angry crowds surrounding the school were free to target the nine students. Chaos ensued in Little Rock and the mayor of the city was prompted to send an urgent plea to the President to restore order. The following day, the President sent in federal troops to restore order and enforce the injunction of the district court. The school would now be integrated.

The difficulty that followed, along with the problem of a defiant state legislature and Governor, put pressure on the school board and they filed a request for a two-and-a-half year delay in implementation of its desegregation plan. The district court granted the board's request and the NAACP, which had been highly involved in the integration cases, appealed the decision. The court of appeals reversed the district court judgment but granted a stay on its decision awaiting appeal to the Supreme Court. A Special Term of the Court was called and the case was set for argument on September 11, 1958.

As the arguments unfolded, a new line of questioning emerged that had not been discussed in the lower court decisions; the [Supremacy Clause of the Constitution](#). The plaintiffs argued that any court decision constitutes a definitive exposition of the meaning of the Constitution. Since the district court had approved a plan for integration, that plan itself constituted the only valid interpretation of the Equal Protection Clause as it applied to this particular case. Plaintiffs therefore argued that the school board request for a delay due to the conduct of the state's governor, was an unconstitutional attempt to offer an alternative constitutional interpretation. The district court's decision, in other words, cannot be delayed because of actions premised upon the belief in an alternative interpretation of the Constitution.

The [Cooper](#) decision was a direct repudiation of the Governor and State Assembly who believed they had the constitutional right to defy a previous Court decision that they did not agree with. By asserting that its own pronouncements were "the supreme law of the land" and stating that court opinions had a "binding effect on the States," some believe that the Supreme Court was stepping beyond the power established by the Framers within the Constitution. Either way, it was clear to many by this point that the court was not a benign institution nor "the least dangerous branch."

Preparation Instructions

Review each lesson plan. Locate and bookmark suggested materials and links from the websites. Download and print out selected documents and duplicate copies as necessary for student viewing. Alternatively, excerpted versions of these documents are available at the end of these lessons along with questions and activities for each lesson.

Teachers will need to read the background and the documents to fully understand the concepts involved in the lesson. Students will be asked to read the documents as part of the activities involved in the lesson and will get a better understanding of [*Cooper v. Aaron*](#) and how the Supreme Court asserted its supremacy in exposition of the law and took the power of the judicial branch beyond the scope of the original intent of the Framers.

Analyzing Primary Sources

If your students lack experience in dealing with primary sources, you might use one or more preliminary exercises to help them develop these skills. [The Learning Page](#) at the [American Memory Project of the Library of Congress](#) includes a set of such activities. Another useful resource is the [Digital Classroom of the National Archives](#), which features a set of [Document Analysis Worksheets](#). Finally, [History Matters](#) offers pages on "[Making Sense of Maps](#)" and "[Making Sense of Oral History](#)" which give helpful advice to teachers in getting their students to use such sources effectively.

Lesson Activities

Activity 1 – The Ratification Debates and [*Cooper v. Aaron*](#)

In the [*Cooper v. Aaron*](#) decision the Supreme Court asserts that its own pronouncements are “the supreme law of the land” and states that court opinions have a “binding effect on the States.” Many critics of the Supreme Court believe they stepped beyond the power established by the Framers within the Constitution. In examining a key excerpt from the decision and key comments made by Publius and Brutus would you agree with this assessment? Students will do a close textual analysis of the excerpts in groups or alone and will answer the questions for discussion. After answering the questions, students will draw a cartoon that visually answers the key question above.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What are some of the historical arguments made against judicial supremacy in the Ratification debates between Publius and Brutus?
- What evidence from the Constitution and the opinion of the Supreme Court would give the Court the belief that it can assert judicial supremacy?

Activity 2 – Oral Arguments in [Cooper v. Aaron](#) and the case of the Supremacy Clause

In the oral arguments in [Cooper v. Aaron](#) the Supreme Court justices began a new line of questioning that had not been discussed in the lower court decisions; the [Supremacy Clause of the Constitution](#). The case continued on this line of questioning and by the time oral arguments were finished the Supremacy Clause had become a major issue for the judges. Why did the use of the Supremacy Clause emerge from the oral arguments and what was the rationale of the Justices using this line of questions? The Governor and the State Assembly refused to comply with the case even after the decision. How did they become even more defiant and what was the effect on the Court decision? In analyzing some of the key statements and questions in the oral arguments, students will evaluate various excerpts from the arguments of [Cooper v. Aaron](#) and will answer questions about each document.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What purpose did the [Supremacy Clause of the Constitution](#) play in the questions of the judges? Why was it important for the judges use this line of questioning?
- What is the importance of the Supreme Court's decision in regard to the rule of law? Why is this decision important to the fundamental law of the Constitution?

Activity 3 – Branch Compliance with Judicial Supremacy

The advancement of judicial supremacy has continued to be asserted by the Court in subsequent cases and it has appeared that the legislative and executive branches, and even the people, have conceded this authority. Why have the executive and legislative branches relinquished their authority to interpret the Constitution? Students will examine a few quotes by former Executives of the United States and do a close textual analysis to fill out a chart analyzing the documents.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What reasons did the Executives in the excerpts give for not going against the Supreme Court, even if they didn't agree with the decision?
- What are the differences between the varying responses by the Executives? Why was Abraham Lincoln's reasoning so much different than the other three?

Assessment

Teachers should have students do the first assessment below to examine student understanding of the [Cooper v. Aaron](#) and judicial supremacy. The second assessment may be used as an extra assessment or as an alternative assessment for students with lesser abilities or reading level.

Assessment 1 – The students will examine the three quotes below that deal with judicial supremacy and will write a persuasive essay using at least one of the quotes as a key component in the writing. Students will also use as many primary documents from the lessons to help write the essay. The assessment rubric is included.

Directions: Using at least one of the quotes below write a persuasive essay that answers the following question. Is judicial supremacy warranted by the Constitution and the history of the [debates between Publius and Brutus](#) or was it conveniently asserted by the Supreme Court in [Cooper v. Aaron](#)? Explain your position and make sure to use examples from documents to solidify your answer.

- “It is emphatically the province and duty of the Judicial Department to say what the law is.” – Chief Justice John Marshall, [Marbury v. Madison](#).
- “It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States.” – Justice William Brennan, [Cooper v. Aaron](#).
- “We are not final because we are infallible, but we are infallible only because we are final.” – Justice Robert Jackson, [Brown v. Allen](#).

Assessment 2 – The students will analyze the summaries from the [“Timeline of Supreme Court School-Desegregation Cases from Brown to Fisher.”](#) They will then choose three cases after *Cooper v. Aaron* from the list and do case reviews to answer the questions. The key question should be why the States continued their resistance of integration in public schools, when the “binding effect” of the *Cooper* decision had already been announced by the Supreme Court.

Directions: Using the [“Timeline of Supreme Court School-Desegregation Cases from Brown to Fisher,”](#) students will choose three cases after [Cooper v. Aaron](#) to analyze and organize a case review by answering the questions that follow.

- If Court decisions have a “binding effect on the States”, why did the new case come before the Court after [Cooper v. Aaron](#) had been decided?
- What are the constitutional issues of the case?
- What do you believe are the strongest arguments of the case?
- Why do you think the Supreme Court decided the case the way it did?
- If you were a Supreme Court Justice, what would you have decided?

Extending the Lesson

Students should be encouraged to research other Supreme Court cases where judicial supremacy has been asserted over the other branches or the states. With this research, students could produce their own Document Based Questions or they could do a case analysis on at least three other court cases they find. Examples of cases include [Baker v. Carr \(1962\)](#), [Powell v.](#)

[*McCormack \(1969\)*](#), [*United States v. Nixon \(1974\)*](#), [*Planned Parenthood v. Casey \(1992\)*](#), and [*Boerne v. Flores\(1997\)*](#).

The students can examine the role that state officials have in resisting or at least reshaping issues that have been brought before the Supreme Court for decision. Students can look at cases on the topics of school prayer, affirmative action, privacy, free speech or medical marijuana and analyze the resistance and why it is prevalent on those issues. After doing their research students can put together a technology presentation to present the merits of their discovery.

Selected Websites and Documents

Teaching American History

- [*Brown v. Board of Education*](#)
- [*Brown v. Board of Education II*](#)
- [*Constitution of the United States*](#)
- [*Supremacy Clause of the Constitution*](#)
- [*Marbury v. Madison*](#)
- [*The Constitutional Convention*](#)
- [*The Ratification Debates*](#)
- [*Abraham Lincoln on Dred Scott*](#)
- [*Federalist 78*](#)
- [*Brutus XII*](#)
- [*Brutus XV*](#)

Justicia.com US Supreme Court

- [*Cooper v. Aaron*](#)
- [*Brown v. Allen*](#)
- [*Baker v. Carr*](#)
- [*Powell v. McCormack*](#)
- [*United States v. Nixon*](#)
- [*Planned Parenthood v. Casey*](#)
- [*Boerne v. Flores*](#)

Cornell University Law School – Legal Information Institute

- [*14th Amendment of the Constitution*](#)

The Lost Year 1958-1959

- [*Little Rock Central High School*](#)
- [*Governor Faubus*](#)

Government Documents Round Table

American Library Association

- [*Arkansas Assembly Legislation*](#)

History Matters

- [*Eisenhower Speech on Little Rock Crisis*](#)

The American Presidency Project

- [*George W. Bush signs McCain-Feingold*](#)

“Timeline of Supreme Court School-Desegregation Cases from Brown to Fisher,”

The Basics

Grade Level

- 9-12

Time Required

- 3 to 5 class periods

Subject Areas

- History, Social Studies
 - U.S. Constitution
 - U.S. History
 - Government
 - Political Science
 - AP U.S. History, Government

Skills

- Critical analysis
- Critical thinking
- Discussion
- Evaluating arguments
- Gathering, classifying and interpreting written, oral and visual information
- Historical analysis
- Interpretation
- Making inferences and drawing conclusions
- Using primary sources

Lesson Resources

- Text documents (attached on the following pages)
- Student Activities (attached on the following pages)
- Assessments (attached on the following pages)

Activity 1 – The Ratification Debates and Cooper v. Aaron

In the Cooper v. Aaron decision the Supreme Court asserts that its own pronouncements are “the supreme law of the land” and states that court opinions have a “binding effect on the States.” Many critics of the Supreme Court believe they stepped beyond the power established by the Framers within the Constitution. In examining a key excerpt from the decision and key comments made by Publius and Brutus would you agree with this assessment? Students will do a close textual analysis of the excerpts in groups or alone and will answer the questions for discussion. After answering the questions, students will draw a cartoon that answers the key question above.

Directions: Read the excerpts on the following pages and answer the questions that follow each excerpt. Make sure to write your answers in paragraph form and use another piece of paper if needed.

Discussion Questions for Activity 1

Directions: After reading the excerpts and answering the questions about them, use your knowledge to answer the discussion questions below. This may be done individually or in groups. Make sure to write your answers in paragraph form on a separate sheet of paper if needed.

- What are some of the historical arguments made against judicial supremacy in the ratification debates between Publius and Brutus?
- What evidence from the Constitution and the opinion of the Supreme Court would give the Court the belief that it can assert judicial supremacy?

Key Excerpt from Majority Opinion, [Cooper v. Aaron](#)

“[Article VI](#) of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of [Marbury v. Madison](#), 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." .”

“The principles announced in that decision (Brown) and the obedience of the states to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth”

Questions for Discussion:

- What purpose does [Article VI](#) have with supremacy? Why is the Supremacy Clause important to the decision in this case?
- Why did the justices quote [Marbury v. Madison](#) in the decision?
- Why do the States and their officer have to follow the decisions of the Supreme Court?

Brutus XV

(T)he supreme court under this constitution would be exalted above all other power in the government, and subject to no controul. The business of this paper will be to illustrate this, and to shew the danger that will result from it. I question whether the world ever saw, in any period of it, a court of justice invested with such immense powers, and yet placed in a situation so little responsible.

There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.

The power of this court is in many cases superior to that of the legislature. I have shewed, in a former paper, that this court will be authorised to decide upon the meaning of the constitution, and that, not only according to the natural and ob[vious] meaning of the words, but also according to the spirit and intention of it. In the exercise of this power they will not be subordinate to, but above the legislature. For all the departments of this government will receive their powers, so far as they are expressed in the constitution, from the people immediately, who are the source of power. The legislature can only exercise such powers as are given them by the constitution, they cannot assume any of the rights annexed to the judicial, for this plain reason, that the same authority which vested the legislature with their powers, vested the judicial with theirs – both are derived from the same source, both therefore are equally valid, and the judicial hold their powers independently of the legislature, as the legislature do of the judicial. – The supreme court then have a right, independent of the legislature, to give a construction to the constitution and every part of it, and there is no power provided in this system to correct their construction or do it away. If, therefore, the legislature pass any laws, inconsistent with the sense the judges put upon the constitution, they will declare it void; and therefore in this respect their power is superior to that of the legislature. In England the judges are not only subject to have their decisions set aside by the house of lords, for error, but in cases where they give an explanation to the laws or constitution of the country, contrary to the sense of the parliament, though the parliament will not set aside the judgment of the court, yet, they have authority, by a new law, to explain a former one, and by this means to prevent a reception of such decisions. But no such power is in the legislature. The judges are supreme – and no law, explanatory of the constitution, will be binding on them.

Brutus XII

Perhaps the judicial power will not be able, by direct and positive decrees, ever to direct the legislature, because it is not easy to conceive how a question can be brought before them in a course of legal discussion, in which they can give a decision, declaring, that the legislature have certain powers which they have not exercised, and which, in consequence of the determination of the judges, they will be bound to exercise. But it is easy to see, that in their adjudications they

may establish certain principles, which being received by the legislature, will enlarge the sphere of their power beyond all bounds.

It is to be observed, that the supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature. The latter can no more deprive the former of this right, than either of them, or both of them together, can take from the president, with the advice of the senate, the power of making treaties, or appointing ambassadors.

In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers. This appears evident from this consideration, that if the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior. The legislature, therefore, will not go over the limits by which the courts may adjudge they are confined. And there is little room to doubt but that they will come up to those bounds, as often as occasion and opportunity may offer, and they may judge it proper to do it. For as on the one hand, they will not readily pass laws which they know the courts will not execute, so on the other, we may be sure they will not scruple to pass such as they know they will give effect, as often as they may judge it proper.

From these observations it appears, that the judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers.

Questions for Discussion:

- Why does Brutus believe the judiciary could be supreme to the legislative branch?
- In what way does the decision process of the Supreme Court make them supreme to the other branches of government?

Federalist 78

Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.

There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act therefore contrary to the constitution can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves; that men acting by virtue of powers may do not only what their powers do not authorize, but what they forbid.

If it be said that the legislative body are themselves the constitutional judges of their own powers and that the construction they put upon them is conclusive upon the other departments it may be answered that this cannot be the natural presumption where it is not to be collected from any particular provisions in the Constitution. It is not otherwise to be supposed that the Constitution could intend to enable the representatives of the people to substitute their *will* to that of their constituents. It is far more rational to suppose that the courts were designed to be an intermediate body between the people and the legislature in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be regarded by the judges as, a fundamental law. It therefore belongs to them to ascertain its meaning as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course; to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.

Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both, and that where the will of the legislature, declared in its statutes, stands in opposition to that of the people, declared in the Constitution, the judges ought to be governed by the latter rather than the former. They ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental.

Questions for Discussion:

- Why is the interpretation of the Constitution the proper function of the courts? Do the other branches also have this authority?
- Does Publius believe that the Supreme Court will be supreme to the legislative branch? What evidence does he give to support his answer?

Cartoon Drawing: After completing the document questions draw a cartoon that visually answers the following question. Draw your cartoon on a separate piece of paper.

- Do you believe the Supreme Court, with its claim of supremacy, has stepped beyond the power established by the Framers within the Constitution?

Cartoon Rubric

Grading Criteria	Excellent (4)	Acceptable (3)	Minimal (2)	Unacceptable (1)
Message	Key issue and cartoonist's position are clearly identifiable.	Key issue and cartoonist's position are identifiable.	Key issue is identifiable; cartoonist's position may be unclear.	Key issue and cartoonist's position are unclear.
Visual Presentation and Creativity	Cartoon is neat and clean; color and creative graphics are used exceptionally well; captions are readable.	Cartoon is neat and clean; color and creative graphics are used; captions are readable.	Cartoon is somewhat neat; some color and creative graphics are used; captions are included.	Cartoon is messy; color and graphics are lacking; captions are omitted or unreadable.

Content	Cartoon clearly conveys an understanding of the issue; excellent use of appropriate symbolism; title is clear, clever, and relevant to topic.	Cartoon conveys understanding of the issue; uses appropriate symbolism; title is clear and relevant to topic.	Cartoon conveys a limited understanding of the issue; attempts to use symbolism; title is unclear or irrelevant to topic.	Cartoon conveys little or no understanding of the issue; does not use symbolism; title is missing.
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SCORE _____

COMMENTS:

Activity 2 – Oral Arguments in [Cooper v. Aaron](#) and the case of the Supremacy Clause

In the oral arguments in [Cooper v. Aaron](#) the Supreme Court justices began a new line of questioning that had not been discussed in the lower court decisions; the [Supremacy Clause of the Constitution](#). The case continued on this line of questioning and by the time oral arguments were finished the Supremacy Clause had become a major issue for the judges. Why did the use of the Supremacy Clause emerge from the oral arguments and what was the rationale of the Justices using this line of questions? The Governor and the State Assembly refused to comply with the case even after the decision. How did they become even more defiant? In analyzing some of the key statements and questions in the oral arguments, students will evaluate various excerpts from oral arguments of [Cooper v. Aaron](#) and will answer questions about each document.

Directions: Read the excerpts that follow from the oral arguments in [Cooper v. Aaron](#), the Supremacy Clause, and the Arkansas Assembly. Answer the questions that follow each document. Use another piece of paper if necessary

Discussion Questions for Activity 2

Directions: After reading the excerpts and answering the questions about them, use your knowledge to answer the discussion questions below. This may be done individually or in groups. Make sure to write your answers in paragraph form on a separate sheet of paper if needed.

- What purpose did the [Supremacy Clause](#) play in the questioning of the judges? Why was it important for the judges use this line of questioning?

- What is the importance of the Supreme Court's decision in regard to the rule of law? Why is this decision important to the fundamental law of the Constitution?

Article VI of the U.S. Constitution (Supremacy Clause)

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Questions for Discussion:

- What constitutes the supreme Law of the Land according to the [Supremacy Clause](#)?

- Where does the supreme power of judicial decisions come from in the Supremacy Clause?

- According to the Supremacy Clause what authority do state judges fall under? Do legislatures and executives of States fall under the same authority? Why or why not?

Key Excerpts from the Oral Arguments in *Cooper v. Aaron*

The supremacy clause issue, which had not been discussed in the lower court opinions, began to emerge in the Supreme Court briefs. The school board's brief stressed its inability to overcome the resistance of state government, as expressed in recent segregationist legislation." A segregationist *amicus* brief argued that *Brown* was not the law of the land. The NAACP brief, on the other hand, argued that the case involved "not only vindication of the constitutional rights declared in *Brown*, but indeed the very survival of the Rule of Law."

The oral argument on September 11 brought the supremacy issue into sharper focus. Early in the argument, the lawyer for the school board conceded to Justice Frankfurter that resistance by state government was a fundamental reason for its request for delay." Somewhat later, Justices Frankfurter and Harlan both indicated that, as they read the record, official actions had caused much of the popular resistance. Justice Brennan then directly raised the supremacy clause issue. He began by reading the clause aloud. He noted that the board's request for a delay was now being attributed to the active opposition of the state government to enforcement of *Brown*. "Just how," he asked, is this Court in a position to allow or sanction or approve a delay sought on the ground that the responsible State officials, rather than be on the side of enforcement of these constitutional rights, have taken actions to frustrate their enforcement?"

The best answer the board lawyer could give was that the school board, as a creature of the state, was "placed between the millstones . . . in a conflict between the State and the Federal government." Later, Justice Harlan followed up on this argument by asking whether a delay would not simply reward the state government's actions. Justice Black then asked again whether the Board's position simply came down to a request for delay because of local resistance.

This question gave rise to the following dialogue:

MR. BUTLER: Let me state it this way, Mr. Justice Black. Here is the position we take. This conflict has resolved itself, as we see it as a School Board, into a head-on collision between the Federal and State Governments.

MR. JUSTICE BLACK: But there is not any doubt about what the Constitution says about that, is there?

MR. BUTLER: No, sir. But that conflict insofar as the executives of those two sovereignties are concerned must be resolved, and this school Board [sic] can't resolve it."

At this point in the argument, the idea had clearly emerged that the school board's request for delay ultimately stemmed from state government resistance and, furthermore, that granting the delay would legitimize resistance by state governments. Moreover, the school board seemed to view itself as subject to dual loyalties in a battle between two sovereigns. The Justices clearly believed that in such a conflict loyalty to the national sovereign was paramount.

Immediately after this exchange, Justice Frankfurter raised the issue from another angle. In a letter to Justice Harlan on September 2, 1958, he had argued that Southern moderates could be won "to the transcending issue of the Supreme Court as the authoritative organ of what the Constitution requires." He expressed the same view in a letter to Chief Justice Warren on the day of oral argument.' At this point in the oral argument, he intervened in search of documentation for his view:

MR. JUSTICE FRANKFURTER: . . .Am I right to infer that you suggest that the mass of people in Arkansas are law-abiding, are not mobsters; they do not like desegregation, but they may be won to respect for the Constitution as pronounced by the organ charged with the duty of declaring it, and therefore adjusting themselves to it, although they may not like it? Is that the significance of what you've said?

MR. BUTLER: Your Honor, you have said it so much better and so much more accurately and so much more concisely than I could that I adopt it wholeheartedly, and that is exactly my personal feeling, and I believe it is the feeling of the School Board as an organization.

At this point, the Court broke for lunch. In the afternoon session, the lawyer for the school board gave a brief summary of his argument. Thurgood Marshall, counsel for the NAACP, then argued for the plaintiffs. He detailed the various legislative measures already enacted and those awaiting Governor Faubus's signature. He concluded by saying that the decision of the court of appeals should be affirmed "in such a fashion as to make clear even to the politicians in Arkansas that Article VI of the Constitution [the supremacy clause] means what it says."

Following the school board's rebuttal argument, the Solicitor General presented the argument on behalf of the United States as *amicus*. His argument also stressed the supremacy issue: What is there in this community, in Little Rock, in Arkansas that's different? . . . The element in this case

is lawlessness. It is a community, a small number at first at least -maybe more later- who decided they were going to defy the laws of this country. And I say to you that that's a problem that's inherent in every little village, great city, or country area of this United States. There isn't a single policeman who isn't going to watch this Court and what it has to say about this matter that doesn't have to deal with people every day who don't like the law he is trying to administer and enforce. And he has to go against that public feeling and will and do his duty. That is the responsibility of every man in this country that's fit to occupy public office.

Now, there is another thing that I object to in the brief of the School Board here and in the argument, and that's this idea that there are two sovereignties, one on this side and one on this side, and they're equal; let's see how they fight it out, and we'll join up with the one that wins.

There is nothing to that stuff, and that's all it is." The Solicitor General then reviewed the history of the Articles of Confederation and pointed to the supremacy clause as disposing of all issues of state and federal conflict. The obligation of the school board, under its oath of office, was "to use all the power they have and exhaust it to try to perform that oath, and first start out with trying to carry out the obligations of the Constitution of the United States as interpreted by this Court." At least, the Solicitor General argued, the board should "come forward and say: We'll tell the people that this Supreme Court has spoken; that's the law of the land; it's binding; we've got to do it; the sooner we do it the better; let's get started."

Thus, by the conclusion of oral argument, the supremacy clause issue had become critical to the case. The school board's position seemed to several Justices to come down to a plea for tolerating obstruction by other agencies of state government. The Solicitor General and the NAACP both had urged the Court to reaffirm its role under the supremacy clause in rejecting the board's claim. Justice Frankfurter and the Solicitor General also had stressed the idea that Southern moderates would prove responsive to an appeal for obedience to the law. Beyond the oral argument itself, the entire history of the Little Rock crisis had involved appeals to *Brown* as the "law of the land." Consequently, it is not surprising that the Court felt compelled to address this issue in its opinion.

Taken from:

- Daniel A. Farber, *The Supreme Court and the Rule of Law: [Cooper v. Aaron](#) Revisited*, 1982 U. Ill. L. Rev. 387 (1982), Available at: <http://scholarship.law.berkeley.edu/facpubs/328>

Questions for Discussion:

- Why did Justice Frankfurter and Black believe the School Board was asking for a delay?

- What two loyalties did the School Board believe it had? What was the Justices response to this?
- The lawyer for the NAACP, Thurgood Marshall, and the Solicitor General believe that the Court should uphold the appeal. Why do they have this belief?
- Why is it not surprising that the Court took the angle of the Supremacy Clause in its discussion in the oral arguments?

Acts of Arkansas

Acts of the Sixty-Second General Assembly of the State of Arkansas Including Extraordinary Session August 26, 1858. (2nd Ex. Sess.) Nos. 1-17.

Acts 1 – 17 of the Second Extraordinary Session of the Sixty First Arkansas General Assembly, 1958, approved and signed by Governor Orville Faubus, September 12, 1958.

Governor Faubus, in response to the U.S. Supreme Court announcement of an emergency session that would surely result in an order to integrate Little Rock Central High, called for an extraordinary session of the Arkansas General Assembly to begin August 26, 1958. Claiming that violence would occur with the integration of Little Rock schools, Faubus, in his opening message to the General Assembly, espoused the need to preserve the peace and retain states' rights of Arkansans to control their own affairs. Of the 17 bills proposed and passed he offered six to postpone integration. Attorney General, Bruce Bennett proposed several others that were meant to intimidate civil rights protestors and weaken the NAACP. In four days the General Assembly passed 17 bills. All Acts were approved September 12.

Act 4, called the "School Closing Act," allowed the closure of any school threatened with racial integration and called for a special election to choose between opening totally integrated schools and keeping the schools closed. Act 4 provided for the immediate dismissal of any school board member or school supervisory personnel who refused to carry out the closing order, the vacancy to be filled by an appointment by the governor.

Acts 5 and 6 allowed the transfer of students and state funds from closed schools to segregated, private schools.

Act 7 allowed segregated classes in integrated schools to enable white students to refuse to attend integrated classes. In the bill it is stated that the U.S. Supreme Court “ignored the psychological impact of integrated schools upon certain white children.”

Acts 8 and 15 appropriated monies for the governor and attorney general to carry out the anti-integration laws.

Act 9 authorized the recall of school board members who did not agree with actions to stall integration.

Act 10 required teachers to sign affidavits listing their contributions to all organizations within the last five years.

Act 11, amending Act 182 of 1929, prohibited the practice of law and removed tax exempt status from certain organizations.

Act 12 required certain organizations “designed to hinder, harass and interfere ... with public schools” to register and report information on request of the county judge.

Act 13 gave the Attorney General access to organizations’ files.

Acts 14 and 16 prohibited individuals and corporations from litigating in relation to Arkansas schools.

Act 17 prohibited anyone from creating a disturbance on any public school property or any other public place of business.

Questions for Discussion:

- How did these Acts of the Arkansas State Assembly show even more defiance on the part of the Assembly and the Governor?
- What was Governor Faubus’ reason for calling the emergency session of the Assembly and passing the laws?

- What was the purpose of the “School Closing Act”?
- Of the other Acts, which three do you believe are the most significant in continuing segregation in Arkansas?

Activity 3 – Branch Compliance with Judicial Supremacy

The advancement of judicial supremacy has continued to be asserted by the Court in subsequent cases and it has appeared that the legislative and executive branches, and even the people, have conceded this authority. Why have the executive and legislative branches relinquished their authority to interpret the Constitution? Students will examine a few quotes by former Executives of the United States and do a close textual analysis to fill out a chart analyzing the documents.

Directions: Read the excerpts that follow from various Executives on conceding to judicial decisions. Also included is a key selection from the majority opinion in [Cooper v. Aaron](#). Use the documents to fill in the chart below.

<u>Executive</u>	<u>Court Issue involved</u>	<u>Reason for Concession</u>	<u>Where in the Opinion</u>
President Abraham Lincoln			

President Dwight Eisenhower			
Vice President Al Gore			
President George W. Bush			

Discussion Questions for Activity 3

Directions: After reading the excerpts and filling out the chart, use your knowledge to answer the discussion questions below. This may be done individually or in groups. Make sure to write your answers in paragraph form on a separate sheet of paper if needed.

- What reasons did the Executives in the excerpts give for not going against the Supreme Court, even if they didn't agree with the decision?

- What are the differences between the varying responses by the Executives? Why was Abraham Lincoln's reasoning so much different than the other three?

Speech on the Dred Scott Decision

Abraham Lincoln

Speech at Springfield, Illinois

June 26, 1857

We believe, as much as Judge Douglas, (perhaps more) in obedience to, and respect for the judicial department of government. We think its decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided in that instrument itself. More than this would be revolution. But we think the Dred Scott decision is erroneous. We know the court that made it, has often over-ruled its own decisions, and we shall do what we can to have it to over-rule this. We offer no resistance to it.

“The courts are the tribunals prescribed by the Constitution and created by the authority of the people to determine, expound and enforce the law. Hence, whoever resists the final decision of the highest judicial tribunal, aims a deadly blow to our whole Republican system of government—a blow, which if successful would place all our rights and liberties at the mercy of passion, anarchy and violence. I repeat, therefore, that if resistance to the decisions of the Supreme Court of the United States, in a matter like the points decided in the Dred Scott case, clearly within their jurisdiction as defined by the Constitution, shall be forced upon the country as a political

issue, it will become a distinct and naked issue between the friends and the enemies of the Constitution-the friends and the enemies of the supremacy of the laws.”

Eisenhower’s 1957 Address on Little Rock, Arkansas

Good Evening, My Fellow Citizens: For a few minutes this evening I want to speak to you about the serious situation that has arisen in Little Rock. To make this talk I have come to the President’s office in the White House. I could have spoken from Rhode Island, where I have been staying recently, but I felt that, in speaking from the house of Lincoln, of Jackson and of Wilson, my words would better convey both the sadness I feel in the action I was compelled today to take and the firmness with which I intend to pursue this course until the orders of the Federal Court at Little Rock can be executed without unlawful interference....

Proper and sensible observance of the law then demanded the respectful obedience which the nation has a right to expect from all its people. This, unfortunately, has not been the case at Little Rock. Certain misguided persons, many of them imported into Little Rock by agitators, have insisted upon defying the law and have sought to bring it into disrepute. The orders of the court have thus been frustrated.

The very basis of our individual rights and freedoms rests upon the certainty that the President and the Executive Branch of Government will support and insure the carrying out of the decisions of the Federal Courts, even, when necessary with all the means at the President’s command.

Unless the President did so, anarchy would result.

There would be no security for any except that which each one of us could provide for himself.

The interest of the nation in the proper fulfillment of the law’s requirements cannot yield to opposition and demonstrations by some few persons.

Mob rule cannot be allowed to override the decisions of our courts.

Al Gore Disagrees with Supreme Court, but accepts its finality

Now the U.S. Supreme Court has spoken. While I strongly disagree with the court’s decision, I accept it. For the sake of our unity and the strength of our democracy, I offer my concession. In one of God’s unforeseen paths, this belatedly broken impasse can point us all to a new common ground, for its very closeness can serve to remind us that we are one people with a shared destiny.

Source: Concession speech in Washington DC Dec 13, 2000

George W. Bush signs McCain-Feingold – Campaign Reform Act of 2002

Today I have signed into law H.R. 2356, the "Bipartisan Campaign Reform Act of 2002." I believe that this legislation, although far from perfect, will improve the current financing system for Federal campaigns...

However, the bill does have flaws. Certain provisions present serious constitutional concerns. In particular, H.R. 2356 goes farther than I originally proposed by preventing all individuals, not just unions and corporations, from making donations to political parties in connection with Federal elections. I believe individual freedom to participate in elections should be expanded, not diminished; and when individual freedoms are restricted, questions arise under the First Amendment. I also have reservations about the constitutionality of the broad ban on issue advertising, which restrains the speech of a wide variety of groups on issues of public import in the months closest to an election. I expect that the courts will resolve these legitimate legal questions as appropriate under the law.

This legislation is the culmination of more than 6 years of debate among a vast array of legislators, citizens, and groups. Accordingly, it does not represent the full ideals of any one point of view. But it does represent progress in this often-contentious area of public policy debate. Taken as a whole, this bill improves the current system of financing for Federal campaigns, and therefore I have signed it into law.

Key Excerpt from Majority Opinion, *Cooper v. Aaron*

“Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." .”

“The principles announced in that decision (*Brown*) and the obedience of the states to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth”

Assessment 1 – The students will examine the three quotes below that deal with judicial supremacy and will write a persuasive essay using at least one of the quotes as a key component in the writing. Students will also use as many primary documents from the lessons to help answer the essay. The assessment rubric is included.

Directions: Using at least one of the quotes below write a persuasive essay that answers the following question. Is judicial supremacy warranted by the Constitution and the history of the [debates between Publius and Brutus](#) or was it conveniently asserted by the Supreme Court in [Cooper v. Aaron](#)? Explain your position and make sure to use examples from documents to solidify your answer.

- “It is emphatically the province and duty of the Judicial Department to say what the law is.” – Chief Justice John Marshall, [Marbury v. Madison](#).
- “It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States.” – Justice William Brennan, [Cooper v. Aaron](#).

- “We are not final because we are infallible, but we are infallible only because we are final.” – Justice Robert Jackson, [*Brown v. Allen*](#).

Rubric for Assessment 1

Persuasive Essay Rubric: Common Core for Reading and Writing Standards

Based on Common Core Standards for Reading/Writing in History/Social Sciences (www.corestandards.org)

Note: Students must MEET or EXCEED standard on the asterisked indicators in order to meet standard on the essay

	Exceeds Standard (A)	Meets Standard (B)	Almost to Standard MUST REWRITE	Below
Standard=no R/W				
Thesis/Claim	<input type="checkbox"/> Thesis/Claim is precise, knowledgeable, significant, and distinguished from alternate or opposing claims	<input type="checkbox"/> Thesis/Claim is precise and knowledgeable, and answers the prompt (W1)	<input type="checkbox"/> Thesis/Claim may be unclear or irrelevant, and/or may not answer prompt	<input type="checkbox"/> Thesis/Claim is missing
*Use of Evidence	<input type="checkbox"/> Develops the topic thoroughly by selecting the most significant and relevant facts, concrete details, quotations, or other information and examples from the text(s) <input type="checkbox"/> Skillfully integrates information into the text selectively to maintain the flow of ideas and advance the thesis <input type="checkbox"/> Skillfully assesses the strengths and limitations of each source	<input type="checkbox"/> Develops the topic by selecting significant and relevant facts, concrete details, quotations, or other information and examples from the text(s) (W2) <input type="checkbox"/> Integrates information into the text selectively to maintain the flow of ideas and advance the thesis (W8) <input type="checkbox"/> Assesses the strengths and limitations of each source (W8)	<input type="checkbox"/> Attempts to develop the topic using facts and other information, but evidence is inaccurate, irrelevant, and/or insufficient <input type="checkbox"/> Attempts to integrate information into the text selectively to maintain the flow of ideas and advance the thesis, but information is insufficient or irrelevant <input type="checkbox"/> Attempts to assess the strengths and limitations of each source, but misinterprets information	<input type="checkbox"/> Does not develop the topic by selecting information and examples from the text(s) <input type="checkbox"/> Does not integrate information from the text <input type="checkbox"/> Does not assess the strengths and limitations of each source

*Use of Analysis	<input type="checkbox"/> Skillfully draws evidence from informational texts to support analysis and thesis/claim <input type="checkbox"/> Skillfully delineates and evaluates the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient <input type="checkbox"/> Skillfully identifies false statements and fallacious reasoning	<input type="checkbox"/> Draws evidence from informational texts to support analysis and thesis/claim (W9) <input type="checkbox"/> Delineates and evaluates the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient (R8) <input type="checkbox"/> Identifies false statements and fallacious reasoning.(R8)	<input type="checkbox"/> Attempts to draw evidence from informational texts to support analysis and thesis/claim but evidence is insufficient and/or irrelevant <input type="checkbox"/> Attempts to delineate and evaluate the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient, but analysis is insufficient <input type="checkbox"/> Attempts to identify false statements and fallacious reasoning, but argument is incomplete or insufficient	<input type="checkbox"/> Does not use evidence from the informational texts to support analysis and/or thesis/claim <input type="checkbox"/> Does not delineate or evaluate claims in text <input type="checkbox"/> Does not identify false claims or fallacious reasoning
*Organization, Writing Style and Conventions	<input type="checkbox"/> Organization skillfully sequences the claim(s), counterclaims, reasons, and evidence. <input type="checkbox"/> Provides a concluding statement or section that skillfully follows from or supports the argument presented <input type="checkbox"/> Skillfully produces clear, coherent, sophisticated writing in which the development, organization, and style are appropriate to task, purpose, and audience	<input type="checkbox"/> Organization logically sequences the claim(s), counterclaims , reasons, and evidence.(W1) <input type="checkbox"/> Provides a concluding statement or section that follows from or supports the argument presented (W1) <input type="checkbox"/> Produces clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience (W4)	<input type="checkbox"/> Attempts to create a logical organization, but may be missing some elements of the assignment, such as a counterclaim <input type="checkbox"/> Attempts to provide a concluding statement or section that follows from or supports the argument presented, but statement does not support thesis <input type="checkbox"/> Attempts to produce clear and coherent writing, but errors in conventions and writing style detract from understanding	<input type="checkbox"/> Does not provide logical organization <input type="checkbox"/> Does not provide a concluding statement or section that follows from or supports the argument presented <input type="checkbox"/> Does not produce clear and coherent writing

Score for this draft: _____

Teacher notes and additional comments:

Assessment 2 – The students will analyze the summaries from the [“Timeline of Supreme Court School-Desegregation Cases from Brown to Fisher.”](#) They will then choose three cases after [Cooper v. Aaron](#) from the list and do case reviews to answer the questions. The key question should be why the States continued their resistance of integration in public schools, when the “binding effect” of the [Cooper](#) decision had already been announced by the Supreme Court.

Directions: Using the “Timeline of Supreme Court School-Desegregation Cases from Brown to Fisher,” students will choose three cases after [Cooper v. Aaron](#) to analyze and organize a case review by answering the questions that follow.

CASE ANALYSIS

- If Court decisions had a “binding effect on the States” after [Cooper v. Aaron](#), why did the new case come before the Court?

- What are the constitutional issues of the case?
- What do you believe are the strongest arguments of the case?
- Why do you think the Supreme Court decided the case the way it did?
- If you were a Supreme Court Justice, what would you have decided?

Timeline of Supreme Court School-Desegregation Cases from Brown to Fisher

American Bar Association

August 7-11, 2013

San Francisco, California

Lessons in Leadership from the Civil Rights Movement

Presenter: Judge Bernice B. Donald

1954

Brown v. Board of Education, 347 U.S. 483 (1954)

Class actions originating in the four states of Kansas, South Carolina, Virginia, and Delaware, by which minor Negro plaintiffs sought to obtain admission to public schools on a non-segregated basis. The United States Supreme Court held that the segregation of children in public schools solely on the basis of race, even though the physical facilities and other tangible factors may be equal, deprives the children of the minority group of equal educational opportunities, in contravention of the Equal Protection Clause of the Fourteenth Amendment.

1955

Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*)

Class actions by which minor plaintiffs sought to obtain admission to public schools on a non-segregated basis. The Supreme Court held that in proceedings to implement Supreme Court's determination, inferior courts might consider problems related to administration, arising from physical condition of school plant, school transportation system,

personnel, revision of school districts and attendance areas into compact units to achieve system of determining admission to public schools on a nonracial basis, and revision of local laws and regulations, and might consider adequacy of any plans school authorities might propose to meet these problems and to effectuate a transition to racially nondiscriminatory school systems.

1958

Cooper v. Aaron, 358 U.S. 1 (1958)

In compliance with *Brown v. Board of Educ.*, a Little Rock, AK. Superintendent of Schools prepared a plan for the desegregation of schools that expected to accomplish the complete desegregation of the school system by 1963.

The Supreme Court held that the governor and legislature of the state were bound by the Supreme Court's prior decision that enforced racial segregation in public schools was an unconstitutional denial of equal protection of laws; and held that, from the point of view of the Fourteenth Amendment, members of the school board and the superintendent of schools stood as agents of state, and that their good faith would not constitute legal excuse for delay in implementing a plan for desegregating schools where actions of other state officials were responsible for conditions alleged by such school officials to make prompt effectuation of desegregation plan impossible and it was conceded that difficulties could be brought under control by state action.

1964

Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964)

Black school children who were denied admission to public schools attended by white children brought suit against the County School Board of Prince Edward County and others to enjoin them from refusing to operate an efficient system of public free schools in Prince Edward County and to enjoin payment of public funds to help support private schools which excluded students on account of race. Section 141 of the Virginia Constitution was amended to authorize the General Assembly and local governing bodies to appropriate funds to assist students to go to public or to nonsectarian private schools, in addition to those own by the state or by the locality. The General Assembly enacted legislation to close any integrated public schools, to cut off funding to such schools, to pay tuition grants to children in nonsectarian private schools, and to extend state retirement benefits to teachers in newly created private schools.

The Supreme Court held that the action of the County School Board in closing the public schools of Prince Edward County and meanwhile contributing to the support of private segregated white schools that took their place denied black school children equal protection of the laws.

1968

Green v. County School Board of New Kent County, 391 U.S. 430 (1968)

New Kent County is a rural county in Eastern Virginia with about fifty-percent of the population being black. There is no residential segregation but the county only has two schools. The School Board operates one white combined elementary and high school and one black combined elementary and high school. In order to remain eligible for federal financial aid, the School Board adopted the 'freedom-of-choice' plan for desegregating the schools, which allowed each student to annually choose between the two schools and those who failed to choose were assigned to their previously attended school. The United States District Court for the Eastern District of Virginia entered judgment adverse to plaintiffs. The United States Court of Appeals, Fourth Circuit, affirmed in part and remanded. Certiorari was granted.

The Supreme Court held that where in three years of operation of the 'freedom of choice' plan, not a single white child had chosen to attend a former Negro public school and 85% of Negro children in system still attended that school, the plan did not constitute adequate compliance with school board's responsibility to achieve a system of determining admission to public schools on nonracial basis and board must formulate new plan and fashion steps promising realistically to convert promptly to a desegregated system. Judgment of Court of Appeals vacated insofar as it affirmed district court and case remanded to district court for further proceedings.

1969

Alexander v. Holmes County Bd. of Ed., 396 U.S. 19 (1969)

The Supreme Court held that the obligation of every school district is to terminate dual school systems at once and to operate now and hereafter only unitary schools, and that school districts operating dual school systems based on race or color must begin immediately to operate unitary school systems within which no person would be effectively excluded from any school because of race or color. Order of Court of Appeals vacated and case remanded with instructions.

1971

Swann v. Charlotte-Mecklenberg Bd. of Ed., 402 U.S. 1 (1971)

This case resulted from a desegregation plan approved by the District Court in 1965. Certiorari was granted to review issues as to duties of school authorities and scope of powers of federal courts under mandates to eliminate racially separate public schools established and maintained by state action.

The Supreme Court held that where dual school system had been maintained by school authorities and school board had defaulted in its duty to come forward with acceptable plan of its own, limited use of mathematical ratios of white to black students, not as an inflexible requirement but as a starting point in the process of shaping a remedy, was within the equitable remedial discretion of the District Court; that pairing and grouping of noncontiguous school zones is permissible tool, to be considered in the light of objective of remedying past constitutional violations; and that where it appeared that assignment of children to the school nearest their home serving their grade would not produce an effective dismantling of the dual system, ordering system of bus transportation, which compared favorably with the transportation plan previously operated in the district, as one tool of school desegregation was within the power of the district court.

1972

Wright v. City of Emporia, 407 U.S. 451 (1972)

In 1967, Emporia successfully sought designation as a city of the second class. As such, it became politically independent from the surrounding county, and undertook a separate obligation under state law to provide free public schooling to children residing within its borders. Eventually, the Emporia City Council sent a letter to the county Board of Supervisors announcing the city's intention to operate a separate school system. Emporia takes the position that since it is a separate political jurisdiction, it is entitled under state law to establish a school system independent of the county. Both before and after it became a city, however, Emporia educated its children in the county schools. Only when it became clear that segregation in the county system was finally to be abolished, did Emporia attempt to take its children out of the county system.

The Supreme Court held that city which had been part of county school system found in violation of the Constitution would not be permitted to establish a separate school system where the effect of so doing would be to impede the process of dismantling a dual system.

U.S. v. Scotland Neck City Bd. of Ed., 407 U.S. 484 (1972)

Consolidated actions challenging implementation of a North Carolina statute authorizing the creation of a new school district for a city which at the time of enactment, the statute was part of county school district then in the process of dismantling a dual school system. The Supreme Court held that implementation of a statute which would have the effect of carving out of an existing district a new unit in which 57% of students would be white and 43% Negro, while schools remaining in existing district would be 89% Negro, would impede the disestablishment of a dual school system in county and implementation would be enjoined.

1973

Norwood v. Harrison, 413 U.S. 455 (1973)

A three-judge District Court for the Northern District of Mississippi sustained validity of Mississippi statutory program under which textbooks are purchased by state and lent to students in both public and

private schools without reference to whether any participating private school has racially discriminatory policies. The complaint alleged that certain of the private schools excluded students on the basis of race and that, by supplying textbooks to students attending such private schools, appellees, acting for the State, have provided direct state aid to racially segregated education. It was also alleged that the textbook aid program thereby impeded the process of fully desegregating public schools, in violation of appellants' constitutional rights.

The Supreme Court held that the Mississippi textbook program was constitutionally weak in that it significantly aided organization and continuation of separate system of private schools, which might discriminate if they so desired.

Keyes v. School Dist. No. 1, 413 U.S. 189 (1973)

Suit wherein parents of children attending public schools sued individually, and on behalf of their minor children, and on behalf of class of persons similarly situated, to remedy alleged segregated condition of certain schools and effects of that condition. The Supreme Court, held that finding of intentionally segregative school board actions in meaningful portion of school system created prima facie case of unlawful segregated design on part of school authorities, and shifted to those authorities the burden of proving that other segregated schools within system were not the result of intentionally segregative actions even if it was determined that different areas of school districts should be viewed independently of each other.

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)

Class action was brought on behalf of school children, who were said to be members of poor families residing in school districts having low property tax base, challenging reliance by Texas school-financing system on local property taxation. The Court concluded that the Texas system does not operate to the peculiar disadvantage of any suspect class. The further held that this is not a case in which the challenged state action must be subjected to the searching judicial scrutiny reserved for laws that create suspect classifications or impinge upon constitutionally protected rights. A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes.

1977

Milliken v. Bradley, 433 U.S. 267 (1977)

In school desegregation case, the United States District Court for the Eastern District of Michigan ordered implementation of student assignment plan and included in its decree educational components in the areas of reading, in-service teacher training, testing and counseling. The Court of Appeals affirmed the order concerning the implementation of and cost sharing for the four educational components and certiorari was granted. The Supreme Court held that (1) district court did not abuse its discretion in approving remedial education plan; (2) requirement that state defendants pay one-half the additional costs attributable to the four educational components did not violate the Eleventh Amendment, and (3) the relief order did not violate the Tenth Amendment and general principles of federalism.

1978

Regents of Univ. of California v. Bakke, 438 U.S. 265 (1978)

White male whose application to state medical school was rejected brought action challenging legality of the school's special admissions program under which 16 of the 100 positions in the class were reserved for "disadvantaged" minority students. School cross-claimed for declaratory judgment that its program was legal. The Supreme Court held that: (1) the special admissions program was illegal, but (2) race may be one of a number of factors considered by school in passing on applications, and (3) since the school could not show that the white applicant would not have been admitted even in the absence of the special admissions program, the applicant was entitled to be admitted.

1979

Dayton Bd. of Ed. v. Brinkman, 443 U.S. 526 (1979)

Students in the Dayton, Ohio, school system, through their parents, brought suit to desegregate city schools. The United States Supreme Court held that: (1) there was no basis in the record to overturn the Court of Appeals' finding that, in 1954, defendants were intentionally operating a dual school system in violation of the equal protection clause; (2) given the fact that a dual school system existed in 1954, the Court of Appeals also properly held that the school board was thereafter under a continuing duty to eradicate the effects of that system; (3) the Court of Appeals was correct in finding that a sufficient case of current, system-wide effect had been established, and (4) in view of the school board's failure to fulfill its affirmative duty and of its conduct which tended to perpetuate or increase segregation, the current, system-wide segregation was properly traceable to the purposefully dual system of the 1950's and to subsequent acts of intentional discrimination.

Columbus Bd. of Ed. v. Penick, 443 U.S. 449 (1979)

In Columbus, Ohio, school desegregation suit, following trial on the issue of liability, the United States District Court for the Southern District of Ohio, Eastern Division, ordered system-wide desegregation, and school board appealed. The Supreme Court held, inter alia, that: (1) record supported lower courts' findings and conclusions that school board's conduct, at the time of trial and before, not only was animated by an unconstitutional, segregative purpose, but also had current, segregative impact that was sufficiently system-wide to warrant the remedy ordered by the district court, and (2) there was no indication that the judgments below rested on any misapprehension of the controlling law.

1982

Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982)

School district sued State of Washington challenging the constitutionality of a statute, adopted through initiative, which prohibited school boards from requiring any student to attend a school other than the school geographically nearest or next nearest his place of residence, but which contained exceptions permitting school boards to assign students away from their neighborhood schools for virtually all purposes required by their educational policies except racial desegregation. The Supreme Court held that the initiative violated the equal protection clause.

Plyler v. Doe, 457 U.S. 202 (1982)

Mexican children who had entered United States illegally and resided in Texas sought injunctive and declaratory relief against exclusion from public schools pursuant to a Texas statute and school district policy. The Supreme Court held that: (1) the illegal aliens who were the plaintiffs could claim the benefit of equal protection clause, which provides that no state shall deny to any person the benefit of jurisdiction in the equal protection of the laws; (2) the discrimination contained in the Texas statute which withheld from local school district any state funds for the education of children who were not "legally admitted" into the United States and which authorized local school district to deny enrollment to such children could not be considered rational unless it furthered some substantial goal of the state; (3) the undocumented status of the children did not establish a sufficient rational basis for denying the benefits that the state afforded other residents; (4) there is no national policy that might justify the state in denying the children an elementary education; and (5) the Texas statute could not be sustained as furthering its interest in the preservation of the state's limited resources for the education of its lawful residents.

1984

Allen v. Wright, 468 U.S. 737 (1984)

Parents of black children attending public schools in districts undergoing desegregation brought nationwide class action alleging that Internal Revenue Service had not adopted sufficient standards and procedures to fulfill its obligation to deny tax-exempt status to racially discriminatory private schools.

The Supreme Court held that: (1) parents did not have standing to prevent the government from violating the law in granting tax exemptions; (2) absent allegation of direct injury, standing could not be predicated on claim of stigmatization caused by racial discrimination; and (3) claim of injury to their children's diminished ability to receive an education in a racially integrated school, although a judicially cognizable injury, failed because the alleged injury was not fairly traceable to the government's conduct that was challenged as unlawful.

1991

Board of Educ. of Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991)

Parents of black students filed motion to reopen school desegregation case, which the district court denied. The Court of Appeals for the Tenth Circuit reversed. On remand, the United States District Court for the Western District of Oklahoma dissolved desegregation decree. The Court of Appeals for the Tenth Circuit reversed and certiorari was granted. The Supreme Court held that: (1) school district was not required to show grievous wrong evoked by new and unforeseen conditions in order to have desegregation decree dissolved; (2) desegregation decrees are not intended to operate in perpetuity; and (3) in determining whether to dissolve desegregation decree, court should consider whether school district has complied in good faith with desegregation decree since it was entered and whether vestiges of past discrimination have been eliminated to the extent practicable.

1992

Freeman v. Pitts, 503 U.S. 467 (1992)

On remand from the Court of Appeals in school desegregation case the United States District Court for the Northern District of Georgia withdrew its control over four areas in desegregation case, and plaintiffs appealed. The Court of Appeals for the Eleventh Circuit reversed. The Supreme Court held that district court has authority to relinquish supervision and control over school district in incremental stages before full compliance has been achieved in every area of school operations.

1995

Missouri v. Jenkins, 515 U.S. 70 (1995)

State appealed from orders of the United States District Court for the Western District of Missouri entered in school desegregation case. The Supreme Court held that: (1) orders designed to attract nonminority students from outside the school district into the school district sought inter-district goal which was beyond the scope of intra-district violation identified by District Court; (2) order requiring across-the-board salary increases for teachers and staff in pursuit of desegregative attractiveness was beyond the scope of the court's remedial authority; and (3) whether students in district are at or below national norms is not appropriate test to determine whether previously segregated district has achieved partially unitary status.

2003

Grutter v. Bollinger, 539 U.S. 306 (2003)

Law school applicants who were denied admission challenged race-conscious admissions policy of state university law school, alleging that the admissions policy encouraging student body diversity violated their equal protection rights. The United States Supreme Court held that: (1) law school had a compelling interest in attaining a diverse student body; and (2) admissions program was narrowly tailored to serve its compelling interest in obtaining the educational benefits that flow from a diverse student body, and thus did not violate the Equal Protection Clause.

Gratz v. Bollinger, 539 U.S. 244 (2003)

Rejected Caucasian in-state applicants for admission to University of Michigan's College of Literature, Science and the Arts (LSA) filed class action complaint against, inter alia, board of regents alleging that university's use of racial preferences in undergraduate admissions violated Equal Protection Clause, Title VI, and § 1981 and seeking, inter alia, compensatory and punitive damages for past violations, declaratory and injunctive relief, and order requiring LSA to offer one of them admission as transfer student. The Supreme Court held that: (1) petitioners had standing to seek declaratory and injunctive relief; (2) university's current freshman admissions policy violated Equal Protection Clause because its use of race was not narrowly tailored to achieve respondents' asserted compelling state interest in diversity; and (3) Title VI and § 1981 were also violated by that policy.

2007

Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007)

Parents brought action against school district challenging, under Equal Protection Clause, student assignment plan that relied on racial classification to allocate slots in oversubscribed high schools. The Supreme Court held that: (1) parents had standing; (2) allegedly compelling interest of diversity in higher education could not justify districts' use of racial classifications in student assignment plans, abrogating *Comfort v. Lynn School Comm.*, 418 F.3d 1 (1st Cir. 2007); (3) and districts failed to show that use of racial classifications in their student assignment plans was necessary to achieve their stated goal of racial diversity.

2009

Horne v. Flores, 557 U.S. 433 (2009)

English Language–Learner (ELL) students and their parents filed class action alleging that State of Arizona was violating Equal Educational Opportunities Act (EEOA) by failing to take appropriate action to overcome language barriers. The Supreme Court held: (1) Superintendent had standing; (2) Court of Appeals should have inquired whether changed conditions satisfied EEOA; (3) district court abused its discretion on remand by focusing only on increased funding for ELL programs; (4) on remand, district court must consider factual and legal challenges that may warrant relief; (5) State's compliance with No Child Left Behind Act (NCLB) benchmarks did not automatically satisfy EEOA requirements; and (6) statewide injunction was not warranted.

2013

Fisher v. Texas, 2013 WL 315520 (June 24, 2013)

Caucasian applicant who was denied admission to state university brought suit alleging that university's consideration of race in its admissions process violated her right to equal protection. The Supreme Court held that the Court of Appeals did not apply the correct standard of strict scrutiny.

Publius vs. Brutus and the Debate over the “Least Dangerous” Branch

Lesson 4 – *Planned Parenthood v. Casey*: The Importance of Precedent to Judicial Legitimacy and Power

Introduction

“Our Constitution is a covenant running from the first generation of Americans to us and then to future generations... We accept our responsibility not to retreat from interpreting the full meaning of the covenant in light of all our precedents. We invoke it once again to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.”

- Joint decision by Justices O’Connor, Kennedy and Souter in [*Planned Parenthood v. Casey*](#)

In [*Roe v. Wade*](#) (1973), the Court famously concluded that a women, with some restrictions, cannot be prohibited by state law from terminating her pregnancy under the due process clause of the Fourteenth Amendment. Asked to confront the divisive issue of abortion rights again nearly twenty years later, the Supreme Court of the United States reaffirmed the “essential holding” of *Roe* in the landmark case [*Planned Parenthood v. Casey*](#) (1992). In a sharply criticized opinion, the Court ruled that an adherence to *Roe* was based on the notion of individual liberty in the [Fourteenth Amendment’s Due Process Clause](#) and upon the doctrine of [*stare decisis*](#) whereby decisions made by the Court must follow the logic of past precedents.

In its decision, the Supreme Court acknowledged that the issue of abortion was highly controversial – a factor that actually defined much of the decision in this case. As the court explained: “To overrule under fire in the absence of the most compelling reason,” the Court stated, “would subvert the Court’s legitimacy beyond any serious question.” With its decision in [*Planned Parenthood*](#), the Court believed it was defending the tradition of the rule of law under the Constitution. Since law is often a matter of interpretation, the Court asserted that it has the power to decide the meaning of the law and its prior decisions are central to the accepted meaning of law in the United States.

The decision in [*Planned Parenthood v. Casey*](#) has led critics to question whether the Supreme Court has claimed an expansion of power beyond the judiciary’s constitutional limits. By insisting that the Court has the authority to decide for the people “their constitutional cases and speak before all others for their constitutional ideals,” the Supreme Court, according to the critics, is making an assertion of judicial supremacy. They could also be accused of defining the “spirit” of law in the establishment of a right of individual liberty bases on the doctrine of *stare decisis*.

This lesson will examine the opinion of the Supreme Court in [*Planned Parenthood v. Casey*](#) with regard to claim of the importance of precedent to the power and legitimacy of the judiciary and whether that assertion leads to judicial supremacy. By looking back at the arguments during the ratification debates between Publius and Brutus, students will be able to analyze the decision of the Court and decide whether they went too far in their adherence to precedent to define the

power of the judicial branch. By examining the history of the case and its Constitutional implications, students will gain a better understanding of the changing power of the modern day Supreme Court and its continued claim as the “ultimate interpreter” of the Constitution.

Guided Questions

- What significant explanations of the legitimacy and power of the Court were justified in [*Planned Parenthood v. Casey*](#) in regard to the principles of *stare decisis* and standards of precedent and did they demonstrate judicial supremacy?
- What historical arguments regarding the significance of precedent to judicial function and power were made during the ratification debates between Publius and Brutus?
- What was the importance of the decision in *Planned Parenthood v. Casey* to the concept of personal liberty under the Due Process Clause of the Fourteenth Amendment and did it express the “spirit” of law which Brutus claimed would expand judicial power.

Learning Objectives

After this lesson students will be able to:

- Analyze the debates between Publius and Brutus and compare and contrast their differing view of the significance of precedent to the power of the judiciary.
- Explain the importance of *stare decisis* to constitutionalism as defined by the Supreme Court in [*Planned Parenthood v. Casey*](#).
- Examine the Supreme Court decision in *Planned Parenthood v. Casey* and assess whether the Court used the standards of precedent to claim judicial supremacy.
- Support an argument for or against the Supreme Court’s use of the principles of *stare decisis* and the standards of precedent to claim legitimacy in regard to its power of interpreting the Constitution.

Background

“Indeed, the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”

- Joint decision by Justices O’Connor, Kennedy and Souter in [*Planned Parenthood v. Casey*](#)

The Supreme Court of the United States, in the landmark case [*Planned Parenthood v. Casey*](#) (1992) set down one of the most significant and interesting opinions of all time. In a decision that reaffirmed the controversial case [*Roe v. Wade*](#), the court concluded that the “essential holding” of [*Roe*](#), which declared that the right to abortion was among the due process rights protected by the Fourteenth Amendment, should be retained against any challenges to the contrary. The Court explained that upholding *Roe* was essential to the continued integrity of the Judiciary as an institution of American government. As Justice O’Connor explained:

"Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare,

comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution."

The Supreme Court confirmed the "essential holding" of *Roe* within the context of the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982, which placed state restrictions on the exercise of a woman's right to terminate her pregnancy. These restrictions included a requirement that a woman seeking an abortion give her informed consent prior to the procedure, and specified that a twenty-four hour waiting period is required before the procedure is performed. Another stipulation of the law required parental consent for a minor to obtain an abortion which included an allowance for judicial bypass. A third restriction required that a married woman seeking an abortion must sign a statement indicating that she has informed her husband, and a fourth requirement imposed certain reporting requirements on facilities that provided abortion services. The last provision of the law allowed an exemption from the first three requirements in the event of a defined medical emergency. Prior to Supreme Court decision, the District Court had held that all of the provisions of the law were unconstitutional and the Court of Appeals affirmed that decision in part and reversed in part, striking down the husband notification provision.

In deciding the case, the Supreme Court stated that the "essential holding" of *Roe* must be retained and they contained three parts: First, a recognized right of a woman to choose to have an abortion before fetal viability and to obtain it without undue interference from the State; Second, a confirmation of the State's power to restrict abortions after viability as long as the law contained exceptions for pregnancies that endanger a woman's life or health; Third, a principle that the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that becomes a child.

The adherence to *Roe* by the Court in *Planned Parenthood v. Casey* was ultimately based on the consideration of fundamental constitutional questions resolved by *Roe*. These included principles of institutional integrity, an obligation to the rule of *stare decisis*, and a notion of a woman's "liberty" in a decision to terminate a pregnancy, which is protected against state interference. This individual liberty is a component of the Due Process Clause of the Fourteenth Amendment. The application of *stare decisis* and a notable appeal to the legitimacy of the Court, were vitally important to the way the case was decided and were also vigorously challenged by the dissenting judges in the case. The dissenting judges also challenged the concept of "liberty" as a value judgment of the majority made not by reason, but by personal preference.

In the end, the Court stated that overruling the "essential holding" of *Roe* "under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy and to the Nation's commitment to the rule of law." The Court believed that it was imperative to adhere to *Roe* despite possible reservations to the contrary. Any reservations would be outweighed by a constitutional explanation of individual liberty, combined with the force of *stare decisis*.

Critics believe that the Court's arguments of legitimacy and appeals to "legally principled decisions" lack some substance when the majority indicates some possible doubt as to the correctness of *Roe* by seemingly adhering to principles already decided instead of departing from them. An indicative statement of doubt is made by the Court when they claim "we are satisfied that the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding."

The questions that need to be answered, according to critics of the decision, is whether the Supreme Court expanded its power beyond its constitutional limits and made yet another assertion of judicial supremacy beyond what the Framers of the Constitution intended. Is there any evidence going back to the Founding of *stare decisis* being a constitutional requirement that legitimizes the judiciary's power and authority? A look back at the history of the ratification debates will help answer these questions and others in regard to the importance of precedent to the legitimacy and power of the Supreme Court.

In the years following the Revolutionary War the courts embarked on a very creative time in the history of judicial power. The new nation had to shape the law according to their needs and this meant abandoning some of the English common law practices and precedents. Judges during this period regularly adopted legal rules that were based on the economic and social demands of the times. A more liberal view of precedent took shape as judges did not feel that they were bound by earlier court decisions, especially if they felt the judgment of the previous court was not decided according to the law. An American system of justice was growing out of new practices and precedents.

During the Ratification debates between Publius and Brutus very little discussion was made on the idea of precedent, but the arguments that did take place on this topic were moving toward the concept that precedent should play a part in judicial function and power as a necessity to limit judicial discretion. Publius wrote, in *Federalist* 78, that in order "to avoid an arbitrary discretion of the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." Brutus contended that the independence and power of judges will be expanded by the adherence to precedent. He believes that "not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation"... and "because they will have precedent to plead, to justify them in it," they will take hold of expansive precedents and enlarge their own powers. This justification of actions based on precedent, according to Brutus, will lead to judicial tyranny as judges will be able to "mold the government into any shape they please."

It cannot be argued that *stare decisis* was a normal part of English law that was followed by the courts of the founding period. There is no evidence that *stare decisis* was a constitutional requirement, but it was used to bind decisions by the judiciary and ensure they were made according to the fundamental laws of the Constitution. The principles of *stare decisis* used by the Supreme Court in *Planned Parenthood v. Casey* is problematic when viewed through the historic lens of the Founding. They controversially tried to protect the legitimacy of the Court by using the force of *stare decisis* to uphold an interpretation of the law that the majority believes might be unconstitutional.

The problem arises from the trimester framework that was used in *Roe v. Wade* to declare the viability of a fetus. By the time the *Planned Parenthood* case was heard, medical technology had been utilized to discover that viability occurred much earlier than the end of the first trimester. The trimester framework in *Roe* was implemented to ensure a woman's right to choose would not become subordinate to the State's interest in promoting fetal life, and under this "rigid" construct, almost no State regulation was permitted during the first trimester. The majority, in *Planned Parenthood*, simply rejected the trimester framework from *Roe* but did not consider it to be an "essential holding" of the case.

The dissenters took the majority to task on this issue of what Justice Scalia called a "keep what you want and throw away the rest" version of *stare decisis*. He believed that the arbitrary trimester framework of *Roe*, which the majority claimed was not a part of the "essential holding," was just as central to *Roe* as the arbitrary viability test, which was retained in *Planned Parenthood*. Chief Justice Rehnquist argued that the trimester framework and other significant parts of *Roe* had been rejected by the majority and he concluded that whatever was left of the "dissected" central holding of *Roe* was surely not the result of *stare decisis*, which the majority claimed. *Roe* continues to exist, he said, "but only in the way a storefront on a Western movie set exists: a mere façade to give the illusion of reality."

The "reality" of the majority opinion in [*Planned Parenthood v. Casey*](#) proclaimed the existence of the principles of *stare decisis* in order to protect the legitimacy of the Court "not for the sake of the Court, but for the sake of the Nation to which it is responsible." The controversy of the decision is that the legitimacy that was invoked to reaffirm *Roe* is undermined by the rejection of precedents established by *Roe*. By ruling on the "spirit" of the law and making an assertion of judicial supremacy based on its authority to decide for the people "their constitutional cases and speak before all others for their constitutional ideals," the Supreme Court in *Planned Parenthood*, is possibly moving toward "mold(ing) the government into any shape they please.

In [*Cooper v. Aaron*](#), the Supreme Court stated that it had the power to "say what the law is." The Court believes this will likely continue as long as the judiciary has the trust of the people, and the people believe the Courts will uphold their individual rights and protect the fundamental law of the Constitution. The "ultimate interpreter" status was declared by the Court again in *Planned Parenthood v. Casey*, but this time it was wrapped around thinly veiled principles of *stare decisis* and compromised institutional integrity. The question is will the legitimacy and power of the Supreme Court continue if they lose the trust and faith of the people.

Preparation Instructions

Review each lesson plan. Locate and bookmark suggested materials and links from the websites. Download and print out selected documents and duplicate copies as necessary for student viewing. Alternatively, excerpted versions of these documents are available at the end of these lessons along with questions and activities for each lesson.

Teachers will need to read the background and the documents to fully understand the concepts involved in the lesson. Students will be asked to read the documents as part of the activities

involved in the lesson and will get a better understanding of [*Planned Parenthood v. Casey*](#) and how the Supreme Court used the principles of *stare decisis* and standards of precedent as a basis to establish judicial legitimacy and power in order to function as a Court dedicated to the rule of law.

Analyzing Primary Sources

If your students lack experience in dealing with primary sources, you might use one or more preliminary exercises to help them develop these skills. [The Learning Page](#) at the [American Memory Project of the Library of Congress](#) includes a set of such activities. Another useful resource is the [Digital Classroom of the National Archives](#), which features a set of [Document Analysis Worksheets](#). Finally, [History Matters](#) offers pages on ["Making Sense of Maps"](#) and ["Making Sense of Oral History"](#) which give helpful advice to teachers in getting their students to use such sources effectively.

Lesson Activities

Activity 1 – The Ratification Debates and [*Planned Parenthood v. Casey*](#)

In [*Planned Parenthood v. Casey*](#), the Supreme Court claims that the principles of *stare decisis* and the standards of precedent are paramount in order for the legitimacy of the Court to be maintained. The Court also stated that if this legitimacy is lost by an unjust overruling of Court precedent, the Supreme Court's capacity to exercise its power would be diminished. Many critics of the decision question whether the Supreme Court has yet again claimed an expansion of power beyond the judiciary's constitutional limits. A key question of constitutionalism would be whether the Framers believed that precedent and the doctrine of *stare decisis* were important to establishing the power of the Court. In examining a key excerpt from the decision and key comments made by Publius and Brutus on precedent would you agree with this assessment? Students will do a close textual analysis of the excerpts in groups or alone and will answer the questions for discussion.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What are some of the key historical arguments made about precedent and the judicial branch in the Ratification debates between Publius and Brutus?
- What evidence from the Constitution and the Ratification debates would give the Court the belief that standards of precedent and the doctrine of *stare decisis* are essential to the legitimacy of power within the judiciary?

Activity 2 – [*Planned Parenthood v. Casey*](#) and Judicial Supremacy

In [*Planned Parenthood v. Casey*](#), the Supreme Court, according to critics of the decision, made an assertion of judicial supremacy by insisting that their authority in Constitutional cases is to decide the ideals of the Constitution for the people. The Court proclaims this power the legitimacy of their decisions over time. Is the claim of judicial supremacy in this case

comparable to the same claim made in [Cooper v. Aaron](#) (1958)? By doing a close textual analysis of key excerpts from both opinions of the Court, students will be able to compare and contrast the language of the opinions and investigate both declarations of judicial supremacy. Students will fill out a chart and perform a comparative analysis on both excerpts.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What are some of the key assertions for judicial supremacy made by the Supreme Court in each opinion?
- What evidence from the Constitution or constitutionalism does each Court maintain gives them the power of judicial supremacy over the meaning of laws under the same document?

Activity 3 – The Importance of Stare Decisis to the Supreme Court

In recent years, Supreme Court Justices have used the principles of stare decisis in their interpretation of the Constitution and in their rationale for opinions of the Court. Present and recent Justices on the Court have differing opinions on the purpose of precedent when deciding cases and when previous precedents should be overruled. The decision in [Planned Parenthood v. Casey](#) was an interesting opinion because of its extreme use of the principles of stare decisis in deciding the case. How does the opinion in this case compare to the differing views of the Justices in regard to *stare decisis*? By examining quotes from recent Justices and comparing them to the opinion in [Planned Parenthood](#), the students will be able to understand these differing views and how Justices believe this concept should be used in interpreting the Constitution. Students will fill out a chart to compare quotes from each Justice to the [Planned Parenthood](#) opinion. Included are excerpts of dissenting opinions in the case by Justice Scalia and Chief Justice Renquist.

At the end of the lesson leave time for discussion to ensure that students can answer the following questions:

- What is *stare decisis* and explain the importance of it to constitutionalism?
- In comparing the differing views of the Justices on the principles of *stare decisis*, is there any common ground among all Justices on their views of this doctrine?
- What is the main argument for the principle of *stare decisis* and the standards of precedent in the plurality opinion of the Court?
- In what ways do the dissenting Justices believe the use of *stare decisis* is wrong in the case of [Planned Parenthood v. Casey](#)?

Assessment

Teachers should have students do the first assessment below to examine student understanding of the case [Planned Parenthood v. Casey](#) and the principles of *stare decisis* and the standards of precedent. The second assessment may be used as an extra assessment or as an alternative assessment for students with lesser abilities or reading level.

Assessment 1 – The students will examine the key excerpts from [*Planned Parenthood v. Casey*](#) and write a persuasive essay for or against the Supreme Court’s use of the principles of *stare decisis* and the standards of precedent to claim legitimacy in regard to its power of interpreting the Constitution. They should also examine whether the Supreme Court, according to the critics, made an assertion of judicial supremacy within their claim of legitimacy. Students should use as many primary documents from the lessons to help in writing the essay. The assessment rubric is included

Directions: Using the key excerpt from the opinion in [*Planned Parenthood v. Casey*](#) write a persuasive essay that answers the following questions: Should the Supreme Court use the principles of *stare decisis* and the standards of precedent to claim legitimacy in regard to its power of interpreting the Constitution? Does this practice lead to an assertion of judicial supremacy on the part of the Court? Explain your position and make sure to use examples from documents to solidify your answer.

Assessment 2 – The students will analyze the key excerpt from the opinion in [*Planned Parenthood v. Casey*](#) and compare it to the dissenting opinions of Justice Scalia and Chief Justice Rehnquist. After comparing these documents, the students will compose a written editorial stating their position on the use of the principle of *stare decisis* in regard to the case. Students should follow the key points on writing an editorial found on the rubric for this assessment. Students should use knowledge from all lesson documents to make their point in the editorial.

Directions: Using the key excerpt from the opinion in [*Planned Parenthood v. Casey*](#) and the dissenting opinions of Justice Scalia and Chief Justice Rehnquist, students should write a newspaper editorial to persuade the readers to support their point of view on the use of the principle of *stare decisis* in [*Planned Parenthood v. Casey*](#). Students will take the side of the opinion or of the dissenters in formulating their point of view on this issue. Students should make sure to follow the key points on writing an editorial as they formulate their composition.

Extending the Lesson

The students can also examine the assertion of whether the Court’s claim of individual liberty within the Fourteenth Amendment’s Due Process Clause is a construction of the “spirit” of the law and would, as Brutus predicted, allow the Court’s to seize upon expansive precedents and increase their own power. By looking at Part II of the opinion of the Court in [*Planned Parenthood v. Casey*](#) and comparing it to the arguments of Publius and Brutus in the Ratification debates, students will be able to explore each side of this examination. The excerpts of Publius and Brutus are attached at the end of the lesson. Use the link to the opinion in [*Planned Parenthood*](#) to get to Part II.

Students should be encouraged to research other Supreme Court cases where principles of *stare decisis* and precedent have been used to overturn previous decisions. Students can examine the standards of present day judges in regard to *stare decisis* and compare them to the reasons given for overruling precedent in these cases. Some examples would be [*Brown v. Board of Education*](#)

(1954) and [*Plessy v. Ferguson*](#) (1896); [*Lochner v. New York*](#) (1905), [*Adkins v. Children's Hospital of District of Columbia*](#) (1923) and [*West Coast Hotel Co. v. Parrish*](#) (1937)

Selected Websites and Documents

Teaching American History

- [*Federalist 78*](#)
- [*Brutus XV*](#)
- [*Brutus XI*](#)
- [*Brutus XII*](#)
- [*Constitutional Convention of 1787*](#)
- [*Ratification Debates*](#)
- [*Brown v. Board of Education*](#)
- [*Plessy v. Ferguson*](#)

Justicia.com US Supreme Court

- [*Planned Parenthood v. Casey*](#)
- [*Roe v. Wade*](#)
- [*Lochner v. New York*](#)
- [*Adkins v. Children's Hospital of District of Columbia*](#)
- [*West Coast Hotel Co. v. Parrish*](#)
- [*Cooper v. Aaron*](#)

Cornell University Law School – Legal Information Institute

- [*14th Amendment of the Constitution*](#)
- [*Due Process Clause of 14th Amendment*](#)

The Avalon Project

- [*Article III of the U.S. Constitution*](#)

The Free Dictionary – Legal Dictionary

- [*Definition of stare decisis*](#)

Street Law

- [*Supreme Court Lessons*](#)

The Supreme Court, PBS

- [*Lesson Plans*](#)

Cornell University Law School Legal Information Institute

- [*Dissent in Planned Parenthood v. Casey, Justice Scalia*](#)
- [*Dissent in Planned Parenthood v. Casey, Chief Justice Renquist*](#)

The Basics

Grade Level

- 9-12

Time Required

- 3 to 5 class periods for each lesson

Subject Areas

- History, Social Studies
 - U.S. Constitution
 - U.S. History
 - Government
 - Political Science
 - AP U.S. History, Government

Skills

- Critical analysis
- Critical thinking
- Discussion
- Evaluating arguments
- Gathering, classifying and interpreting written, oral and visual information
- Historical analysis
- Interpretation
- Making inferences and drawing conclusions
- Using primary sources

Lesson Resources

- Text documents (attached on the following pages)
- Student Activities (attached on the following pages)
- Assessments (attached on the following pages)

Activity 1 – The Ratification Debates and *Planned Parenthood v. Casey*

In the *Planned Parenthood v. Casey* decision, the Supreme Court claims that the principle of stare decisis and the standards of precedent are paramount in order for the legitimacy of the Court to be maintained. The Court also stated that if this legitimacy is lost by an unjust overruling of Court precedent, the Supreme Court's capacity to exercise its power would be diminished. Many critics of the decision question whether the Supreme Court has yet again claimed an expansion of power beyond the judiciary's constitutional limits. A key question of constitutionalism would be whether the Framers believed that precedent and the doctrine of stare decisis were important to establishing the power of the Court. In examining a key excerpt from the decision and key comments made by Publius and Brutus on precedent would you agree with this assessment? Students will do a close textual analysis of the excerpts in groups or alone and will answer the questions for discussion.

Directions: Read the excerpts on the following pages and answer the questions that follow each excerpt. Make sure to write your answers in paragraph form and use another piece of paper if needed.

Discussion Questions for Activity 1

Directions: After reading the excerpts and answering the questions about them, use your knowledge to answer the discussion questions below. This may be done individually or in groups. Make sure to write your answers in paragraph form on a separate sheet of paper if needed.

- What are some of the key historical arguments made about precedent and the judicial branch in the Ratification debates between Publius and Brutus?
- What evidence from the Constitution and the Ratification debates would give the Court the belief that standards of precedent and the doctrine of stare decisis are essential to the legitimacy of power within the judiciary?

Key Excerpt from *Planned Parenthood v. Casey*

The examination of the conditions justifying the repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by *Brown* is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did. In the present cases, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so, it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States, and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money, and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case. This is not to say, of course, that this Court cannot give a perfectly satisfactory explanation in most cases. People understand that some of the Constitution's language is hard to fathom, and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions. However upsetting it may be to those most directly affected when one judicially derived rule replaces another, the country can accept some correction of error without necessarily questioning the legitimacy of the Court.

In two circumstances, however, the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can

plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

That first circumstance can be described as hypothetical; the second is to the point here and now. Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*) ("[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them").

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise, this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court's duty in the present case is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

Questions for Discussion:

- Why would overruling [*Roe v. Wade*](#) central holdings weaken the Court's capacity to exercise judicial power?
- What is the source of the Court's authority and why is this source so important to how the people view the judiciary and its power?
- Under what two circumstances will the Court fail to receive the benefit from the people if they overrule precedent?
- What would happen to the Court's legitimacy in the eyes of the people if they overruled precedent under pressure from a controversial case instead of the principles of the Consitution?
- According to the opinion, what is the clear duty of the Supreme Court in [*Planned Parenthood v. Casey*](#) in regard to the standards of precedent and the principles of stare decisis?

FEDERALIST 78

(Excerpt on precedent)

That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission. Periodical appointments, however regulated, or by whomsoever made, would in some way or other, be fatal to their necessary independence. If the power of making them was committed either to the executive or legislature there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity to justify a reliance that nothing would be consulted but the Constitution and the laws.

There is yet a further and a weighty reason for the permanency of the judicial offices which is deducible from the nature of the qualifications they require. It has been frequently remarked with great propriety that a voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them; and it will readily be conceived from the variety of controversies which grow out of the folly and wickedness of mankind that the records of those precedents must unavoidably swell to a very considerable bulk and must demand long and laborious study to acquire a competent knowledge of them. Hence it is that there can be but few men in the society who will have sufficient skill in the laws to qualify them for the stations of judges. And making the proper deductions for the ordinary depravity of human nature, the number must be still smaller of those who unite the requisite integrity with the requisite knowledge. These considerations apprise us that the government can have no great option between fit characters; and that a temporary duration in office which would naturally discourage such characters from quitting a lucrative line of practice to accept a seat on the bench would have a tendency to throw the administration of justice into hands less able and less well qualified to conduct it with utility and dignity. In the present circumstances of this country and in those in which it is likely to be for a long time to come, the disadvantages on this score would be greater than they may at first sight appear; but it must be confessed that they are far inferior to those which present themselves under the other aspects of the subject.

Upon the whole, there can be no room to doubt that the convention acted wisely in copying from the models of those constitutions which have established *good behavior* as the tenure of their judicial offices, in point of duration; and that so far from being blamable on this account, their plan would have been inexcusably defective if it had wanted this important feature of good government. The experience of Great Britain affords an illustrious comment on the excellence of the institution.

Questions for Discussion:

- What is the view of Publius on the importance of precedent to the judicial branch?

- According to Publius, how will the standards of precedent affect the quality of judges needed to sufficiently understand the cases and how they pertain to the Constitution?

BRUTUS XI

(Excerpt on Precedent)

2d. Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation. Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favour it; and that they will do it, appears probable.

3d. Because they will have precedent to plead, to justify them in it. It is well known, that the courts in England, have by their own authority, extended their jurisdiction far beyond the limits set them in their original institution, and by the laws of the land.

The court of exchequer is a remarkable instance of this. It was originally intended principally to recover the king's debts, and to order the revenues of the crown. It had a common law jurisdiction, which was established merely for the benefit of the king's accomptants. We learn from Blackstone, that the proceedings in this court are grounded on a writ called quo minus, in which the plaintiff suggests, that he is the king's farmer or debtor, and that the defendant hath done him the damage complained of, by which he is less able to pay the king. These suits, by the statute of Rutland, are expressly directed to be confined to such matters as specially concern the king, or his ministers in the exchequer. And by the articuli super cartas, it is enacted, that no common pleas be thenceforth held in the exchequer contrary to the form of the great charter: but now any person may sue in the exchequer. The surmise of being debtor to the king being matter of form, and mere words of course; and the court is open to all the nation.

When the courts will have a precedent before them of a court which extended its jurisdiction in opposition to an act of the legislature, is it not to be expected that they will extend theirs, especially when there is nothing in the constitution expressly against it? and they are authorised to construe its meaning, and are not under any controul?

This power in the judicial, will enable them to mould the government, into almost any shape they please.
– The manner in which this may be effected we will hereafter examine.

Questions for Discussion:

- According to Brutus, how will the power of precedent extend the power of the judiciary under the Constitution?
- How does the power of precedent, along with the authority to give the Constitution meaning, affect the power of the judicial branch?

Activity 2 – [*Planned Parenthood v. Casey*](#) and Judicial Supremacy

In [*Planned Parenthood v. Casey*](#), the Supreme Court, according to critics of the decision, made an assertion of judicial supremacy by insisting that their authority in Constitutional cases is to decide the ideals of the Constitution for the people. The Court proclaims this power the legitimacy of their decisions over time. Is the claim of judicial supremacy in this case comparable to the same claim made in [*Cooper v. Aaron*](#) (1958)? By doing a close textual analysis of key excerpts from both opinions of the Court, students will be able to compare and contrast the language of the opinions and investigate both declarations of judicial supremacy. Students will fill out a chart and perform a comparative analysis on both excerpts.

Directions: Read the excerpts on the following pages and use them to fill out a chart for comparison of the claim of judicial supremacy in [*Planned Parenthood v. Casey*](#) and [*Cooper v. Aaron*](#).

Supreme Court Case	Reasons for Judicial Supremacy	Constitutional Evidence Asserted
<i>Planned Parenthood v. Casey</i>		

Planned Parenthood v. Casey

(Excerpt on Judicial Supremacy)

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise, this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court's duty in the present case is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to

overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

Key Excerpt from Majority Opinion, *Cooper v. Aaron*

“Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of [*Marbury v. Madison*](#), 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." .”

“The principles announced in that decision (*Brown*) and the obedience of the states to them, according to the command of the Constitution, are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth”

Activity 3 – The Importance of *Stare Decisis* to the Supreme Court

In recent years, Supreme Court Justices have used the principles of *stare decisis* in their interpretation of the Constitution and in their rationale for opinions of the Court. Present and recent Justices on the Court have differing opinions on the purpose of precedent when deciding cases and when previous precedents should be overruled. The decision in [*Planned Parenthood v. Casey*](#) was an interesting opinion because of its extreme use of the principles of *stare decisis* in deciding the case. How does the opinion in this case compare to the differing views of the Justices in regard to *stare decisis*? By examining quotes from recent Justices and comparing them to the opinion in [*Planned Parenthood*](#), the students will be able to understand the differing views on *stare decisis* and how Justices believe this concept should be used in interpreting the Constitution. Students will fill out a chart to compare quotes from each Justice to the [*Planned Parenthood*](#) opinion. Included are excerpts of dissenting opinions in the case by Justice Scalia and Chief Justice Renquist.

Discussion Questions for Activity 3

Directions: After reading the excerpts and filling out the chart, use your knowledge to answer the discussion questions below. This may be done individually or in groups. Make sure to write your answers in paragraph form on a separate sheet of paper if needed.

- What is *stare decisis* and explain the importance of it to constitutionalism?
- In comparing the differing views of the Justices on the principles of *stare decisis*, is there any common ground among all Justices on their views of this doctrine?

- What is the main argument for the principle of *stare decisis* and the standards of precedent in the plurality opinion of the Court?
- In what ways do the dissenting Justices believe the use of *stare decisis* is wrong in the case of [*Planned Parenthood v. Casey*](#)?

Directions: Read the excerpts on the following pages and use them to fill out a chart for comparison of recent Justices views on *stare decisis* compared to the excerpt of the opinion in [*Planned Parenthood v. Casey*](#).

Justice	View of <i>Stare Decisis</i>	Comparison Difference between Justice and <i>Planned Parenthood</i>
<i>Chief Justice Roberts</i>		
<i>Justice Alito</i>		
<i>Justice Thomas</i>		
<i>Justice O'Connor</i>		

<i>Justice Breyer</i>		
<i>Justice Scalia (dissenting opinion)</i>		
<i>Chief Justice Renquist (dissenting opinion)</i>		

Comments by Supreme Court Justices About *Stare Decisis*

John Roberts at his U.S. Senate confirmation hearing, September 2005:

“The importance of settled expectations in the application of *stare decisis* is a very important consideration ... the principles of *stare decisis* look at a number of factors. Settled expectations is one of them... Whether or not particular precedents have proved to be unworkable is another consideration on the other side ...I do think it is a jolt to the legal system when you overrule a precedent. Precedent plays an important role in promoting stability and evenhandedness. It is not enough – and the Court has emphasized this on several occasions – that you may think the prior decision was wrongly decided. And you do look at these other factors, like settled expectations, like whether a particular precedent is workable or not, whether a precedent has been eroded by subsequent developments. All of those factors go into the determination of whether to revisit a precedent under the principles of *stare decisis*.”

Samuel Alito at his U.S. Senate confirmation hearing, January 2006:

“The doctrine of *stare decisis* is a fundamental part of our legal system. And it’s the principle that courts in general should follow their past precedents. And it’s important for a variety of reasons... it limits the power of the judiciary ... it protects reliance interests ...and it reflects the view that courts should respect the judgments and the wisdom that are embodied in prior judicial decisions. It’s not an inexorable command, but it is a general presumption that courts are going to follow prior precedents. I agree that, in every case in which there is prior precedent, the first issue is the issue of *stare decisis*. And the presumption is that the Court will follow its prior precedents. There needs to be a special justification for overruling a prior precedent.

“Factors that weigh in favor of *stare decisis* are things like the initial vote on the case, the length of time that the case has been on the books, whether it has been reaffirmed, whether it has been reaffirmed on *stare decisis* grounds, whether there has been reliance, the nature and the extent of the reliance, (and) whether the precedent has proved to be workable.

“(But) I don’t think anybody would want a rule in the area of constitutional law that said that a constitutional decision once handed down can never be overruled.”

Most commentators think that **Justice Thomas** is probably the individual on the current Court who gives least weight to precedent, particularly if he thinks the precedent was wrongly decided in the first place. Here’s an excerpt from his concurring opinion in *Randall v. Sorrell*, the campaign finance case from Vermont decided in June 2006:

“I continue to believe that *Buckley* (*Buckley v. Valeo* is the precedent that was applied by the majority in deciding *Randall*) provides insufficient protection to political speech, the core of the First Amendment. The illegitimacy of *Buckley* is further underscored by the continuing inability of the Court to apply *Buckley* in a coherent and principled fashion. As a result *stare decisis* should provide no bar to overruling *Buckley* and replacing it with a standard faithful to the First Amendment.”

Stephen Breyer, writing for the Court in *Randall v. Sorrell*, the Vermont campaign finance reform decision, 2006:

"The Court has often recognized the 'fundamental importance' of *stare decisis*, the basic legal principle that commands judicial respect for a court's earlier decisions and the rules of law they embody. The Court has pointed out that *stare decisis* 'promotes the evenhanded, predictable and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'

Stare decisis thereby avoids the instability and unfairness that accompany disruption of settled legal expectations. For this reason, the rule of law demands that adhering to our prior case law be the norm. Departure from precedent is exceptional and requires special justification."

In June 2005, Justices **Sandra Day O'Connor** and Stephen G. Breyer participated in a taped interview with students in a question-and-answer session sponsored by the Annenberg Foundation Trust at Sunnylands.

When asked about what might influence the justices to overturn a precedent, Justice O'Connor said: "Well, I think you have to be able to persuade at least five members of this nine-member Court that an earlier judgment and opinion decided by this Court is now clearly wrong. That is possible to do. We can be persuaded at times that something we decided earlier has become, over time, no longer defensible.

And the most clear big example of that was in *Brown v. Board of Education* when the Supreme Court decided to overrule the old *Plessy v. Ferguson* principle that you could have separate public facilities for people based on race, provided they were roughly the same. You know, the same school, one for people of the black race, one for people of the white race. That's what *Plessy* said was all right. The members of this Court unanimously concluded that just was not valid and it overturned it, [*Plessy*.]

So what standard is required? It's just a standard of persuading at least five members of the Court that an earlier precedent is clearly wrong and shouldn't remain the law of the nation."

Justice Scalia

(Excerpt of dissent in Planned Parenthood v. Casey)

The authors of the joint opinion, of course, do not squarely contend that *Roe v. Wade* was a *correct* application of "reasoned judgment"; merely that it must be followed, because of *stare decisis*. But in their exhaustive discussion of all the factors that go into the determination of when *stare decisis* should be observed and when disregarded, they never mention "how wrong was the decision on its face?" Surely, if "[t]he Court's power lies . . . in its legitimacy, a product of substance and perception," the "substance" part of the equation demands that plain error be acknowledged and eliminated. *Roe* was plainly wrong--even on the Court's methodology of "reasoned judgment," and even more so (of course) if the proper criteria of text and tradition are applied.

The Court's reliance upon *stare decisis* can best be described as contrived. It insists upon the necessity of adhering not to all of *Roe*, but only to what it calls the "central holding." It seems to me that *stare decisis* ought to be applied even to the doctrine of *stare decisis*, and I confess never to have heard of this new, keep what you want and throw away the rest version. I wonder whether, as applied to *Marbury v. Madison*, 1 Cranch 137 (1803), for example, the new version of *stare decisis* would be satisfied if we allowed courts to review the constitutionality of only those statutes that (like the one in *Marbury*) pertain to the jurisdiction of the courts

Chief Justice Renquist

(Excerpt of dissent in Planned Parenthood v. Casey)

The joint opinion of Justices O'Connor, Kennedy, and Souter cannot bring itself to say that *Roe* was correct as an original matter, but the authors are of the view that "the immediate question is not the soundness of *Roe*'s resolution of the issue, but the precedential force that must be accorded to its holding." Instead of claiming that *Roe* was correct as a matter of original constitutional interpretation, the opinion therefore contains an elaborate discussion of *stare decisis*. This discussion of the principle of *stare decisis* appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*.

Stare decisis is defined in Black's Law Dictionary as meaning "to abide by, or adhere to, decided cases." Black's Law Dictionary 1406 (6th ed. 1990). Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.

In our view, authentic principles of *stare decisis* do not require that any portion of the reasoning in *Roe* be kept intact. "*Stare decisis* is not . . . a universal, inexorable command," especially in cases involving the interpretation of the Federal Constitution. Erroneous decisions in such constitutional cases are uniquely durable, because correction through legislative action, save for constitutional amendment, is impossible. It is therefore our duty to reconsider constitutional interpretations that "depar[t] from a proper understanding" of the Constitution. [I]n cases involving the Federal Constitution, . . . [t]he Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.' Our constitutional watch does not cease merely because we have spoken before on an issue; when it becomes clear that a prior constitutional interpretation is unsound we are obliged to reexamine the question.

Key Excerpt from *Planned Parenthood v. Casey*

The examination of the conditions justifying the repudiation of *Adkins* by *West Coast Hotel* and *Plessy* by *Brown* is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did. In the present cases, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis would not be complete, however, without explaining why overruling Roe's central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so, it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic.

The root of American governmental power is revealed most clearly in the instance of the power conferred by the Constitution upon the Judiciary of the United States, and specifically upon this Court. As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money, and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means, and to declare what it demands.

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices

that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.

The need for principled action to be perceived as such is implicated to some degree whenever this, or any other appellate court, overrules a prior case. This is not to say, of course, that this Court cannot give a perfectly satisfactory explanation in most cases. People understand that some of the Constitution's language is hard to fathom, and that the Court's Justices are sometimes able to perceive significant facts or to understand principles of law that eluded their predecessors and that justify departures from existing decisions. However upsetting it may be to those most directly affected when one judicially derived rule replaces another, the country can accept some correction of error without necessarily questioning the legitimacy of the Court.

In two circumstances, however, the Court would almost certainly fail to receive the benefit of the doubt in overruling prior cases. There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith. Despite the variety of reasons that may inform and justify a decision to overrule, we cannot forget that such a decision is usually perceived (and perceived correctly) as, at the least, a statement that a prior decision was wrong. There is a limit to the amount of error that can plausibly be imputed to prior Courts. If that limit should be exceeded, disturbance of prior rulings would be taken as evidence that justifiable reexamination of principle had given way to drives for particular results in the short term. The legitimacy of the Court would fade with the frequency of its vacillation.

That first circumstance can be described as hypothetical; the second is to the point here and now. Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*) ("[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them").

The country's loss of confidence in the Judiciary would be underscored by an equally certain and equally reasonable condemnation for another failing in overruling unnecessarily and under pressure. Some cost will be paid by anyone who approves or implements a constitutional decision where it is unpopular, or who refuses to work to undermine the decision or to force its reversal. The price may be criticism or ostracism, or it may be violence. An extra price will be paid by those who themselves disapprove of the decision's results when viewed outside of constitutional terms, but who nevertheless struggle to accept it, because they respect the rule of law. To all those who will be so tested by following, the Court implicitly undertakes to remain steadfast, lest in the end a price be paid for nothing. The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise, this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing

breach of it would be nothing less than a breach of faith, and no Court that broke its faith with the people could sensibly expect credit for principle in the decision by which it did that.

It is true that diminished legitimacy may be restored, but only slowly. Unlike the political branches, a Court thus weakened could not seek to regain its position with a new mandate from the voters, and even if the Court could somehow go to the polls, the loss of its principled character could not be retrieved by the casting of so many votes. Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.

The Court's duty in the present case is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule Roe's essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of Roe's original decision, and we do so today.

Assessment 1 – The students will examine the key excerpts from *Planned Parenthood v. Casey* and write a persuasive essay for or against the Supreme Court's use of the principles of [*stare decisis*](#) and the standards of precedent to claim legitimacy in regard to its power of interpreting the Constitution. They should also examine whether the Supreme Court, according to the critics, made an assertion of judicial supremacy within their claim of legitimacy. Students should use as many primary documents from the lessons to help in writing the essay. The assessment rubric is included

Directions: Using the key excerpt from the opinion in [*Planned Parenthood v. Casey*](#) write a persuasive essay that answers the following questions: Should the Supreme Court use the principles of [*stare decisis*](#) and the standards of precedent to claim legitimacy in regard to its power of interpreting the Constitution? Does this practice lead to an assertion of judicial supremacy on the part of the Court? Explain your position and make sure to use examples from documents to solidify your answer.

- **Key Excerpt from [*Planned Parenthood v. Casey*](#) can be found in Activity 1 and Activity 3.**

Rubric for Assessment 1

Persuasive Essay Rubric: Common Core for Reading and Writing Standards

Based on Common Core Standards for Reading/Writing in History/Social Sciences (www.corestandards.org)

Note: Students must MEET or EXCEED standard on the asterisked indicators in order to meet standard on the essay

	Exceeds Standard (A)	Meets Standard (B)	Almost to Standard MUST REWRITE	Below Standard=no R/W
Thesis/Claim	<input type="checkbox"/> Thesis/Claim is precise, knowledgeable, significant, and distinguished from alternate or opposing claims	<input type="checkbox"/> Thesis/Claim is precise and knowledgeable, and answers the prompt (W1)	<input type="checkbox"/> Thesis/Claim may be unclear or irrelevant, and/or may not answer prompt	<input type="checkbox"/> Thesis/Claim is missing
*Use of Evidence	<input type="checkbox"/> Develops the topic thoroughly by selecting the most significant and relevant facts, concrete details, quotations, or other information and examples from the text(s) <input type="checkbox"/> Skillfully integrates information into the text selectively to maintain the flow of ideas and advance the thesis <input type="checkbox"/> Skillfully assesses the strengths and limitations of each source	<input type="checkbox"/> Develops the topic by selecting significant and relevant facts, concrete details, quotations, or other information and examples from the text(s) (W2) <input type="checkbox"/> Integrates information into the text selectively to maintain the flow of ideas and advance the thesis(W8) <input type="checkbox"/> Assesses the strengths and limitations of each source (W8)	<input type="checkbox"/> Attempts to develop the topic using facts and other information, but evidence is inaccurate, irrelevant, and/or insufficient <input type="checkbox"/> Attempts to integrate information into the text selectively to maintain the flow of ideas and advance the thesis, but information is insufficient or irrelevant <input type="checkbox"/> Attempts to assess the strengths and limitations of each source, but misinterprets information	<input type="checkbox"/> Does not develop the topic by selecting information and examples from the text(s) <input type="checkbox"/> Does not integrate information from the text <input type="checkbox"/> Does not assess the strengths and limitations of each source

<p>*Use of Analysis</p>	<p><input type="checkbox"/> Skillfully draws evidence from informational texts to support analysis and thesis/claim</p> <p><input type="checkbox"/> Skillfully delineates and evaluates the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient</p> <p><input type="checkbox"/> Skillfully identifies false statements and fallacious reasoning</p>	<p><input type="checkbox"/> Draws evidence from informational texts to support analysis and thesis/claim (W9)</p> <p><input type="checkbox"/> Delineates and evaluates the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient (R8)</p> <p><input type="checkbox"/> Identifies false statements and fallacious reasoning.(R8)</p>	<p><input type="checkbox"/> Attempts to draw evidence from informational texts to support analysis and thesis/claim but evidence is insufficient and/or irrelevant</p> <p><input type="checkbox"/> Attempts to delineate and evaluate the argument and specific claims in cited texts, assessing whether the reasoning is valid and the evidence is relevant and sufficient, but analysis is insufficient</p> <p><input type="checkbox"/> Attempts to identify false statements and fallacious reasoning, but argument is incomplete or insufficient</p>	<p><input type="checkbox"/> Does not use evidence from the informational texts to support analysis and/or thesis/claim</p> <p><input type="checkbox"/> Does not delineate or evaluate claims in text</p> <p><input type="checkbox"/> Does not identify false claims or fallacious reasoning</p>
<p>*Organization, Writing Style and Conventions</p>	<p><input type="checkbox"/> Organization skillfully sequences the claim(s), counterclaims, reasons, and evidence.</p> <p><input type="checkbox"/> Provides a concluding statement or section that skillfully follows from or supports the argument presented</p> <p><input type="checkbox"/> Skillfully produces clear, coherent, sophisticated writing in which the development, organization, and style are appropriate to task, purpose, and audience</p>	<p><input type="checkbox"/> Organization logically sequences the claim(s), counterclaims, reasons, and evidence.(W1)</p> <p><input type="checkbox"/> Provides a concluding statement or section that follows from or supports the argument presented (W1)</p> <p><input type="checkbox"/> Produces clear and coherent writing in which the development, organization, and style are appropriate to task, purpose, and audience (W4)</p>	<p><input type="checkbox"/> Attempts to create a logical organization, but may be missing some elements of the assignment, such as a counterclaim</p> <p><input type="checkbox"/> Attempts to provide a concluding statement or section that follows from or supports the argument presented, but statement does not support thesis</p> <p><input type="checkbox"/> Attempts to produce clear and coherent writing, but errors in conventions and writing style detract from understanding</p>	<p><input type="checkbox"/> Does not provide logical organization</p> <p><input type="checkbox"/> Does not provide a concluding statement or section that follows from or supports the argument presented</p> <p><input type="checkbox"/> Does not produce clear and coherent writing</p>

Score for this draft: _____

Teacher notes and additional comments:

Assessment 2 – The students will analyze the key excerpt from the opinion in *Planned Parenthood v. Casey* and compare it to the dissenting opinions of Justice Scalia and Chief Justice Renquist. After comparing these documents, the students will compose a written editorial stating their position on the use of the principle of *stare decisis* in regard to the case. Students should follow the key points on writing an editorial found on the rubric for this assessment. Students should use knowledge from all lesson documents to make their point in the editorial.

Directions: Using the key excerpt from the opinion in *Planned Parenthood v. Casey* and the dissenting opinions of Justice Scalia and Chief Justice Renquist, students should write a newspaper editorial to persuade the readers to support their point of view on the use of the principle of *stare decisis* in *Planned Parenthood v. Casey*. Students will take the side of the opinion or of the dissenters in formulating their point of view on this issue. Students should make sure to follow the key points on writing an editorial as they formulate their composition.

- *The Key excerpt from [Planned Parenthood v. Casey](#) can be found in Activity 1 and Activity 3.*
- *The dissenting opinion excerpts from Justice Scalia and Chief Justice Renquist can be found in Activity 3.*

Editorial Rubric

KEY POINTS

- Newspaper editorial pages contain opinion articles written about specific topics or events that often affect the general public.
- Editorial writers hope to influence the readers to either get involved with a particular cause or help correct a social problem.
- Editorials often have titles that give the readers an indication of the topic discussed in the piece.
- The editorial writer provides his or her opinion in the third person. The goal of an editorial is to persuade the readers to support the writer's point of view on the topic.

Category	4	3	2	1
<i>Title/Overall Message</i>	Clearly focused on topic and clearly written.	Focused on topic with some minor flaws.	Needs to be more focused on the topic.	No clear connection to topic at hand.

<i>Persuasive Argument</i>	Logical progression of information and ideas. A strong argument for the writer's point of view with a clear message to the reader.	Logical progression of information and ideas throughout most of the editorial. The reader has some indication of the point of view of the writer.	Limited logical progression of ideas, opinion and ideas. The reader must make some assumptions about the writer's point of view.	No logical progression of information, opinion or ideas. The writer provides no indication of his or her point of view.
<i>Use of primary source documents and class discussion</i>	Well researched topic with strong connections to the primary source documents. Writer includes relevant information discussed in class.	Adequately researched topic with some connections to the primary source documents. Writer includes some relevant information discussed in class.	Limited research of the topic with weak connections to the primary source documents. Writer includes little to no relevant information discussed in class.	No research of the topic and no real connections to the primary source documents. Writer includes no relevant information discussed in class.
<i>Writing Mechanics</i>	The editorial is well written in paragraph form and is free from spelling and/or grammatical errors.	The editorial is written in paragraph form and has a few insignificant spelling and/or grammatical errors.	The editorial is written in paragraph form and contains several spelling and grammatical errors.	The editorial is poorly written and is not in paragraph form. It contains significant spelling and grammatical errors.

Total Points/Grade: _____

Comments:

Extending the Lesson

- The following documents can be used for an extension of the lesson:

BRUTUS XI

(Excerpt on spirit of the law)

From these remarks, the authority and business of the courts of law, under this clause, may be understood.

They will give the sense of every article of the constitution, that may from time to time come before them. And in their decisions they will not confine themselves to any fixed or established rules, but will determine, according to what appears to them, the reason and spirit of the constitution. The opinions of the supreme court, whatever they may be, will have the force of law; because there is no power provided in the constitution, that can correct their errors, or controul their adjudications. From this court there is no appeal. And I conceive the legislature themselves, cannot set aside a judgment of this court, because they

are authorised by the constitution to decide in the last resort. The legislature must be controuled by the constitution, and not the constitution by them. They have therefore no more right to set aside any judgment pronounced upon the construction of the constitution, than they have to take from the president, the chief command of the army and navy, and commit it to some other person. The reason is plain; the judicial and executive derive their authority from the same source, that the legislature do theirs; and therefore in all cases, where the constitution does not make the one responsible to, or controulable by the other, they are altogether independent of each other.

The judicial power will operate to effect, in the most certain, but yet silent and imperceptible manner, what is evidently the tendency of the constitution: – I mean, an entire subversion of the legislative, executive and judicial powers of the individual states. Every adjudication of the supreme court, on any question that may arise upon the nature and extent of the general government, will affect the limits of the state jurisdiction. In proportion as the former enlarge the exercise of their powers, will that of the latter be restricted.

That the judicial power of the United States, will lean strongly in favour of the general government, and will give such an explanation to the constitution, as will favour an extension of its jurisdiction, is very evident from a variety of considerations ...

2d. Not only will the constitution justify the courts in inclining to this mode of explaining it, but they will be interested in using this latitude of interpretation. Every body of men invested with office are tenacious of power; they feel interested, and hence it has become a kind of maxim, to hand down their offices, with all its rights and privileges, unimpaired to their successors; the same principle will influence them to extend their power, and increase their rights; this of itself will operate strongly upon the courts to give such a meaning to the constitution in all cases where it can possibly be done, as will enlarge the sphere of their own authority. Every extension of the power of the general legislature, as well as of the judicial powers, will increase the powers of the courts; and the dignity and importance of the judges, will be in proportion to the extent and magnitude of the powers they exercise. I add, it is highly probable the emolument of the judges will be increased, with the increase of the business they will have to transact and its importance. From these considerations the judges will be interested to extend the powers of the courts, and to construe the constitution as much as possible, in such a way as to favour it; and that they will do it, appears probable.

BRUTUS XII

(Excerpt on spirit of the law)

Perhaps the judicial power will not be able, by direct and positive decrees, ever to direct the legislature, because it is not easy to conceive how a question can be brought before them in a course of legal discussion, in which they can give a decision, declaring, that the legislature have certain powers which they have not exercised, and which, in consequence of the determination of the judges, they will be bound to exercise. But it is easy to see, that in their adjudications they may establish certain principles, which being received by the legislature, will enlarge the sphere of their power beyond all bounds.

It is to be observed, that the supreme court has the power, in the last resort, to determine all questions that may arise in the course of legal discussion, on the meaning and construction of the constitution. This power they will hold under the constitution, and independent of the legislature. The latter can no more

deprive the former of this right, than either of them, or both of them together, can take from the president, with the advice of the senate, the power of making treaties, or appointing ambassadors.

In determining these questions, the court must and will assume certain principles, from which they will reason, in forming their decisions. These principles, whatever they may be, when they become fixed, by a course of decisions, will be adopted by the legislature, and will be the rule by which they will explain their own powers. This appears evident from this consideration, that if the legislature pass laws, which, in the judgment of the court, they are not authorised to do by the constitution, the court will not take notice of them; for it will not be denied, that the constitution is the highest or supreme law. And the courts are vested with the supreme and uncontrollable power, to determine, in all cases that come before them, what the constitution means; they cannot, therefore, execute a law, which, in their judgment, opposes the constitution, unless we can suppose they can make a superior law give way to an inferior. The legislature, therefore, will not go over the limits by which the courts may adjudge they are confined. And there is little room to doubt but that they will come up to those bounds, as often as occasion and opportunity may offer, and they may judge it proper to do it. For as on the one hand, they will not readily pass laws which they know the courts will not execute, so on the other, we may be sure they will not scruple to pass such as they know they will give effect, as often as they may judge it proper.

From these observations it appears, that the judgment of the judicial, on the constitution, will become the rule to guide the legislature in their construction of their powers.

What the principles are, which the courts will adopt, it is impossible for us to say; but taking up the powers as I have explained them in my last number, which they will possess under this clause, it is not difficult to see, that they may, and probably will, be very liberal ones.

We have seen, that they will be authorized to give the constitution a construction according to its spirit and reason, and not to confine themselves to its letter.

FEDERALIST 78

(Excerpt on will and spirit of judges)

It can be of no weight to say that the courts, on the pretence of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature. This might as well happen in the case of two contradictory statutes; or it might as well happen in every adjudication upon any single statute. The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body. The observation, if it proved anything, would prove that there ought to be no judges distinct from that body.

If, then, the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments, this consideration will afford a strong argument for the permanent tenure of judicial offices, since nothing will contribute so much as this to that independent spirit in the judges which must be essential to the faithful performance of so arduous a duty.

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals from the effects of those ill humors which the arts of designing men, or the influence of particular conjunctures, sometimes disseminate among the people themselves, and which, though they speedily give place to better information, and more deliberate reflection, have a tendency, in the meantime, to occasion dangerous innovations in the government, and serious oppressions of the minor party in the community. Though I trust the friends of the proposed Constitution will never concur with its enemies in questioning that fundamental principle of republican government which admits the right of the people to alter or abolish the established Constitution whenever they find it inconsistent with their happiness; yet it is not to be inferred from this principle that the representatives of the people, whenever a momentary inclination happens to lay hold of a majority of their constituents incompatible with the provisions in the existing Constitution would, on that account, be justifiable in a violation of those provisions; or that the courts would be under a greater obligation to connive at infractions in this shape than when they had proceeded wholly from the cabals of the representative body. Until the people have, by some solemn and authoritative act, annulled or changed the established form, it is binding upon themselves collectively, as well as individually; and no presumption, or even knowledge of their sentiments, can warrant their representatives in a departure from it prior to such an act. But it is easy to see that it would require an uncommon portion of fortitude in the judges to do their duty as faithful guardians of the Constitution, where legislative invasions of it had been instigated by the major voice of the community.

But it is not with a view to infractions of the Constitution only that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws. It not only serves to moderate the immediate mischiefs of those which may have been passed but it operates as a check upon the legislative body in passing them; who, perceiving that obstacles to the success of an iniquitous intention are to be expected from the scruples of the courts, are in a manner compelled, by the very motives of the injustice they meditate, to qualify their attempts. This is a circumstance calculated to have more influence upon the character of our governments than but few may be aware of. The benefits of the integrity and moderation of the judiciary have already been felt in more states than one; and though they may have displeased those whose sinister expectations they may have disappointed, they must have commanded the esteem and applause of all the virtuous and disinterested. Considerate men of every description ought to prize whatever will tend to beget or fortify that temper in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today. And every man must now feel that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence and to introduce in its stead universal distrust and distress.